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# American Hegemony and the Foreign Affairs Constitution

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# AMERICAN HEGEMONY AND THE FOREIGN AFFAIRS CONSTITUTION

Robert Knowles<sup>†</sup>

**ABSTRACT:** *This Article uses insights from international relations theory to challenge the received wisdom that U.S. courts are incompetent to decide foreign affairs issues. Since September 11, 2001, in particular, proponents of broad executive power have argued that the Judiciary lacks the Executive's expertise, speed, flexibility, uniformity, and political savvy necessary in foreign affairs. For these reasons, legal doctrine has long called for especially strong foreign affairs deference to the Executive.*

*This Article argues that special deference is grounded in an outmoded version of the popular theory of international relations known as realism. Realism views the world as anarchic, nations as opaque to the outside world, and geopolitics as though a few great powers manage the international system through realpolitik and the balance of power. When incorporated into constitutional foreign affairs law, these realist tenets lead to a model that prioritizes executive branch competences over judicial ones, but offers little guidance on how to weigh foreign affairs effectiveness against other constitutional values such as liberty and accountability.*

*The Author proposes a new, "hegemonic" model of desired institutional competences in foreign affairs law that takes account of the transformed post-Cold War world. America dominates the globe militarily, has a political system accessible to outsiders, provides public goods for the world, and plays a major role in defining enforceable international law. This American-led order will persist for some time despite threats posed by terrorism and the rise of powers such as China and Russia. Under the hegemonic model, courts serve America's foreign affairs interests by maintaining stable interpretation of the law and bestowing legitimacy on acts of the political branches. Special deference is now unwarranted. This Article concludes by explaining why *Boumediene v. Bush* and other recent enemy combatant cases are consistent with the hegemonic model.*

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## INTRODUCTION

How should the balance of power in the world affect the separation of powers under the U.S. Constitution? The conventional approaches to this question rely on an outmoded view of geopolitics. This Article offers a new model for assessing the courts' appropriate role in foreign affairs.

American courts treat foreign affairs issues as unique and requiring very strong, sometimes absolute, deference to the Executive.<sup>1</sup> These "special deference" doctrines are a swamp of under-justification and inconsistent application.<sup>2</sup> But when courts and scholars do seek to justify special deference in foreign affairs, they usually resort to received wisdom about superior executive branch competence—attributes such as speed, flexibility, secrecy, and uniformity—contrasted with judicial incompetence.<sup>3</sup> In the

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1. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 22 (2d ed. 1996) [hereinafter HENKIN, *FOREIGN AFFAIRS*]; Curtis Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 663 (2000) [hereinafter Bradley, *Chevron*] (surveying the deference doctrines). The courts give executive branch interpretations of treaties "great weight." See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 355 (2006) (quoting *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)). Scholars have concluded that in practice this translates into a very high level of deference. See David Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1468–69 (1999) ("When it comes to treaty construction, courts are likely to continue masking an almost abdicationist stance in judicial review as merely gracious deference to executive branch interpretation."); Scott Sullivan, *Rethinking Treaty Interpretation*, 86 TEX. L. REV. 777, 789 (2008) (describing contemporary treaty interpretation as involving "near-total deference"). But see Martin S. Flaherty, *Globalization and Executive Power* (forthcoming) (manuscript at 5–20, on file with author) [hereinafter Flaherty, *Globalization*] (concluding that courts invoke "great weight" deference but reach the same conclusions as they would using other tools of statutory interpretation). Courts also abstain far more often from deciding foreign relations cases under the political question doctrine. See THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 19–20 (1992); PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 444 (4th ed. 1998) ("Though successful resort to the political question doctrine in purely domestic disputes is rare, the doctrine appears to have greater vitality in foreign affairs."); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 943 (2004) (concluding that "reports of the doctrine's demise in foreign affairs are greatly exaggerated").

2. See Bradley, *Chevron*, *supra* note 1, at 663 ("In most of its deference decisions, the Supreme Court has simply assumed, or has asserted in a conclusory fashion, that foreign affairs should in fact make a difference."); Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1733 (2007) ("There is no question that a deference doctrine of some kind currently exists with respect to executive-branch treaty interpretations. But the precise nature of that doctrine, its triggering conditions, and the obligations it imposes on judges are far from clear."); Nzelibe, *supra* note 1, at 943 (concluding that the judicial application of the political question doctrine in foreign affairs is "replete with so many inconsistencies that its basic contours remain ill-defined and incoherent").

3. See, e.g., *Miami Nation of Indians v. U.S. Dep't of the Interior*, 255 F.3d 342, 347 (7th Cir. 2001) (Posner, J.) (explaining that the rationale for labeling certain issues as not amenable



years since 9/11, in particular, these pragmatic arguments have been the weapon of choice for defenders of special deference.<sup>4</sup> The courts are, apparently, bringing a knife to a gunfight.<sup>5</sup>

Why do foreign affairs demand that the executive branch enjoy vast discretion? The courts' view of their own competence has been shaped by America's role in the world. There is a deep, if usually unarticulated, connection between the assumed need for special deference and a popular theory of international relations known as realism. Realism depicts an anarchic international realm, populated only by nation-states, and dominated by roughly co-equal great powers carefully balancing one another.<sup>6</sup> Executive competences are required to handle this dangerous and unstable external environment.<sup>7</sup>

This classic realist model of comparative institutional competence seemed appropriate when America was one of several, or even two, great powers. But even then, importing international relations ("IR") realism into constitutional foreign affairs doctrine was a recipe for chaos. *Realpolitik* teaches that the state must do whatever is necessary to protect itself.<sup>8</sup> But how can courts successfully balance this overriding principle against other constitutional values such as the protection of liberty?

Moreover, the post-Cold War world has provoked a crisis in realism.<sup>9</sup> The United States is a global hegemon. It is unrivaled in its ability to deploy force throughout the globe, and it provides "public goods" for the world—such as the protection of sea lanes—in exchange for broad acceptance of

to judicial resolution is "based on the extreme sensitivity of the conduct of foreign affairs, judicial ignorance of those affairs, and the long tradition of regarding their conduct as an executive prerogative because it depends on speed, secrecy, freedom from the constraint of rules—and the unjudicial mindset that goes by the name *Realpolitik*"; Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMM. 179, 200–01 (2006) [hereinafter Ku & Yoo, *Hamdan*]; Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1202 (2007).

4. See, e.g., Ku & Yoo, *Hamdan*, *supra* note 3, at 200–01; Posner & Sunstein, *supra* note 3, at 1202–07.

5. See, e.g., *INDIANA JONES AND THE KINGDOM OF THE CRYSTAL SKULL* (Lucasfilm 2008) (Indiana Jones: "I think you just brought a knife to a gunfight"). Indy is referencing a scene from the first installment in the series, *RAIDERS OF THE LOST ARK* (Paramount 1982), in which he used his gun to effortlessly dispatch a tough-looking goon impressively wielding a sword.

6. See G. John Ikenberry, *Liberalism and Empire: Logics of Order in the American Unipolar Age*, 30 REV. OF INT'L STUD. 609, 612 (2004) [hereinafter Ikenberry, *Liberalism*].

7. See Nzelibe, *supra* note 1, at 977–78 (arguing from a realist perspective that the anarchic nature of the international system requires special deference because the Executive Branch is more competent than the courts to conduct foreign policy in this environment).

8. For a discussion of realism and *realpolitik*, see *infra* Part II.A.

9. Campbell Craig, *American Realism Versus American Imperialism*, 57 WORLD POL. 143, 144 (2004).



U.S. leadership.<sup>10</sup> Although realism predicts counter-balancing, no great power or coalition has yet emerged to challenge America's predominance. And despite a new round of predictions about American decline, the U.S. is still projected to have by far the largest economy and the largest military for decades.<sup>11</sup> Political scientists have struggled to define this American-led system, but courts and scholars of constitutional law have largely ignored it.<sup>12</sup> Instead, most debates about special deference have simply accepted outmoded classic realist assumptions that became conventional wisdom in the 1930s and 40s.

This Article offers a new model for assessing appropriate judicial deference in foreign affairs that takes account of American-led order. By maintaining consistent interpretation of U.S. and international law over time and providing virtual representation for other nations and non-citizens, U.S. courts bestow legitimacy on the acts of the political branches, provide public goods for the world, and increase America's soft power—all of which assist in maintaining the stability and legitimacy of the American-led hegemonic order.

This "hegemonic" model substantially eliminates the problematic deference gap between foreign and domestic cases and enables courts to appropriately balance foreign affairs needs against other separation-of-powers goals by "domesticating" foreign affairs deference. The hegemonic model also has explanatory and predictive value. In four recent cases addressing habeas claims by alleged enemy combatants, the Supreme Court rejected special deference.<sup>13</sup> It refused to defer to the executive branch

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10. MICHAEL MANDELBAUM, *THE CASE FOR GOLIATH: HOW AMERICA ACTS AS THE WORLD'S GOVERNMENT IN THE TWENTY-FIRST CENTURY* 7–9, 31–139 (2006) (describing numerous international public goods provided exclusively or primarily by the United States); Ikenberry, *Liberalism*, *supra* note 6, at 609 ("The United States is not just a superpower pursuing its interests; it is a producer of world order.").

11. See *infra* notes 326–334 and accompanying text.

12. See Daniel Abebe, *Great Power Politics and the Structure of Foreign Relations Law*, CHI. J. INT'L L. (forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1331162](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1331162) (arguing that the breadth of executive authority in foreign affairs should be considered through the lens of internal and external constraints, and that the hegemonic system places fewer constraints on the U.S. executive than in the past). Two scholars have drawn on a competing theory of international relations, liberalism, to argue that globalization and the tendency of democracies to form close ties may eliminate the justifications for special deference, at least in some circumstances. See Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?*, 106 HARV. L. REV. 1980, 2000 (1993) [hereinafter Slaughter Burley, *Foreign Affairs*]; Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 652 (2002); see also *infra* notes 99–101 and accompanying text.

13. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008) (holding that Congress's attempt to eliminate habeas corpus for accused non-citizen enemy combatants at Guantánamo



interpretations of foreign affairs statutes and international law, and even asserted military exigencies. The hegemonic model justifies this recent rejection of special deference and explains why it could augur increased judicial involvement in foreign affairs.

The interpretive scope here is limited. The hegemonic model is functional but concerns overall governmental effectiveness in foreign affairs, not the appropriate allocation of power with respect to any particular policy. Nor do I analyze the appropriate allocation of foreign affairs powers between the President and Congress, although the hegemonic model has many implications for this relationship as well. Finally, I do not address formalist—e.g., originalist—arguments for or against special deference. The hegemonic model provides insights that should be considered in conjunction with the teachings of text, structure, and history.<sup>14</sup>

This Article proceeds in four parts. In Part I, a background section, I explain functionalism's centrality to debates about the separation of powers in foreign affairs. I then describe the major special deference doctrines. I conclude by briefly recounting the Supreme Court's refusal to apply special deference in the enemy combatant cases.

Part II explains the origins of the functional justifications for special deference. It limns the major tenets of international relations realism as it had been traditionally understood prior to the post-Cold War era. Realists describe the international realm as inherently de-centralized and unstable.<sup>15</sup> Nation-states, rather than individuals or institutions, are the only viable units. States are identical in terms of their function—like “billiard balls colliding”<sup>16</sup>—and the only salient difference among them is their relative power.<sup>17</sup> Great powers determine the structure of the system, and enforceable international law merely reflects their interests.<sup>18</sup> A lay version

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Bay was unconstitutional); *Hamdan v. Rumsfeld*, 548 U.S. 557, 557 (2006) (declaring unlawful the military commissions established to try certain enemy combatants for war crimes); *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (holding that alien detainees at Guantánamo had a statutory right to invoke habeas jurisdiction); *Hamdi v. Bush*, 542 U.S. 507, 509 (2004) (holding that citizen-detainees possessed the right to challenge their detention using habeas).

14. I have used originalist approaches elsewhere. See Robert Knowles, *The Balance of Forces and the Empire of Liberty: States' Rights and the Louisiana Purchase*, 88 IOWA L. REV. 343, 343 (2003) (examining the original understanding of the Treaty and Admissions Clauses and concluding that the Louisiana Treaty was unconstitutional).

15. Robert Keohane, *Neorealism and the Study of World Politics*, in *NEOREALISM AND ITS CRITICS* 14–15 (1986) [hereinafter Keohane, *Neorealism*].

16. Daniel H. Nexon & Thomas Wright, *What's at Stake in the American Empire Debate*, 101 AM. POL. SCI. REV. 253, 256 (2007).

17. Keohane, *Neorealism*, *supra* note 15, at 15.

18. Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 507 (1995) [hereinafter Slaughter, *International*].



of realism became incorporated into constitutional foreign relations law largely through the landmark 1936 decision, *Curtiss-Wright*.<sup>19</sup> This completed the transformation to an executive-centered understanding of the foreign affairs Constitution driven by America's acquisition of an empire and rise to great power status.

Part III comprehensively maps the functional justifications to corresponding realist tenets, and explains how these realist assumptions create more problems than they solve. First, this classic realist model does not accurately depict the actual functioning of the branches in foreign affairs. For example, although foreign relations is said to require that the United States "speak with one voice," Congress and the President often conflict on foreign policy. Second, as a descriptive matter, the realist model encounters boundary problems because globalization will continue to blur the distinction between domestic and foreign affairs issues. Third, as a normative matter, the realist model, if accepted in full, would require total deference: it tells us very little about how best to balance foreign policy needs against other constitutional values.

Part IV describes the current international order and introduces the hegemonic model, which I construct using insights from three mainstream preeminent-power theories: unipolarity, hegemony, and empire.<sup>20</sup> The hegemonic model assumes that (1) the hegemon plays a major role in determining enforceable international norms; (2) the system is durable and stable; and that (3) the stability of the system depends not only on the hegemon's military predominance, but also on its provision of "public goods" for the system as a whole and the perceived legitimacy of the order. The hegemonic model aligns the assessment of institutional competences more closely with the positive reality of the international system. It brings more coherence to the courts' treatment of foreign affairs by largely "domesticating" it. And the hegemonic model reveals additional functional justifications for greater judicial involvement in foreign affairs controversies.

Part IV concludes by using the hegemonic model to explain and justify the results in the enemy combatant cases. In the Post-9/11 Era, the United States faces serious threats from transnational terrorist groups such as al-Qaeda, rogue states, and the proliferation of WMDs, but these phenomena will not themselves alter the hegemonic structure of the international system. When they are properly viewed as problems of hegemonic

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19. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

20. *See* Nexon & Wright, *supra* note 16, at 255.



management rather than as some new form of realist balancing, they cannot, in most situations, justify special deference.

## I. FUNCTIONALISM AND FOREIGN AFFAIRS DEFERENCE

The judicial treatment of foreign affairs comprises an amorphous constellation of special doctrines that require very strong deference to the executive branch.<sup>21</sup> Pragmatic, or functional, justifications lie at the heart of this special deference. Courts and scholars have assessed the relative institutional foreign affairs competences of the President, Congress, and the Judiciary. The President almost always wins by virtue of superior flexibility, speed, accountability, political savvy, and uniformity.<sup>22</sup> But largely unexamined are the reasons *why* foreign affairs require these prized competences.

In this Part, I discuss functionalism's importance in foreign affairs separation-of-powers analysis and describe the major special deference doctrines. I then recount a recent and striking departure from special deference: in four landmark cases considering habeas rights of accused enemy combatants, the Supreme Court exercised more robust judicial review akin to its treatment of domestic cases. The Court seems to have ignored, even rejected, traditional assessments of institutional competence. What justifies this refusal to defer?

### A. *The Prominence of Functionalism in Foreign Affairs*

The uniqueness of foreign affairs stems in part from a void in the text that has long bedeviled constitutional analysis in this area.<sup>23</sup> Article II of the Constitution specifically allocates only a handful of foreign affairs powers to the President,<sup>24</sup> but Article I fails to provide Congress with all, or even most, of the remaining powers necessary to conduct foreign policy.<sup>25</sup> This

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21. See Bradley, *Chevron*, *supra* note 1, at 663.

22. See *infra* Part III for an in-depth discussion of these competences.

23. See LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 2 (1990) (describing as a "twilight zone" the legal ambiguity created by a Constitution that gives scant attention to foreign affairs and whose framers could not have envisioned the importance that foreign policy would assume in our governance).

24. The President's enumerated powers are to receive ambassadors, to act as Commander in Chief of the military, and to share with the Senate the power to make treaties and ambassadorial appointments. U.S. CONST. art. II, §§ 2–3.

25. HENKIN, FOREIGN AFFAIRS, *supra* note 1, at 14–15 (concluding that "a host" of powers "were clearly intended for, and have always been exercised by, the federal government, but where does the Constitution say it shall be so?").



void is puzzling given that one clear purpose of the Constitution was to overcome the slow, fractured, and limp foreign policy power previously vested in Congress by the Articles of Confederation.<sup>26</sup>

With the text presenting this difficulty, opposing sides in the classic twentieth century debates about the separation of powers in foreign affairs turned to extra-textual sources for ammunition. The debate was engaged most intensely on whether the President, Congress, or neither should have primacy.<sup>27</sup> In general, the nature of the textual problem influenced the approaches to constitutional interpretation—formalist or functionalist—taken by the defenders and critics of presidential primacy. Formalism and functionalism are the two broad categories of methods for interpreting the Constitution's allocation of powers among the branches.<sup>28</sup> Formalist approaches look to the Constitution's text, structure, and historical materials thought to reveal the meaning of the text.<sup>29</sup> Pure formalism is essentialist—it seeks to understand whether a particular power is inherently executive, judicial, or legislative.<sup>30</sup> In contrast, functionalism examines whether a given allocation of power serves particular purposes.<sup>31</sup>

Because Congress has many more specifically-enumerated foreign affairs powers than the President, a formalist would appear to be on stronger ground arguing for congressional primacy.<sup>32</sup> On the other hand, a

26. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 277 (2001) (noting that, under the Articles of Confederation, Congress “enjoyed the executive power,” but was criticized from the beginning as lacking the “secrecy, dispatch, and consistency” required to effectively conduct foreign affairs).

27. *Id.* at 238.

28. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1734 & n.34, 1739–42 (1996) [hereinafter Flaherty, *Dangerous*]; Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, CONN. L. REV. (forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1159595](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159595).

29. See Martin H. Redish & Elizabeth J. Cisar, “If Angels Were to Govern”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 454 (1991) (describing formalism as the view that “the constitutional validity of a particular branch action, from the perspective of separation of powers, is to be determined not by resort to functional balancing, but solely by the use of a definitional analysis”). There is, of course, no consensus on the precise boundaries between formalism and functionalism. See William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J. L. & PUB. POL’Y 21, 21–22 (1998); Pearlstein, *supra* note 28.

30. Redish & Cisar, *supra* note 29, at 455.

31. *INS v. Chadha*, 462 U.S. 919, 944 (1983) (describing functionalism as inquiring whether “a given law or procedure is efficient, convenient, and useful in facilitating the functions of government,” and concluding that “[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government”); Pearlstein, *supra* note 28.

32. This argument quickly encounters difficulties, however, because the powers provided to Congress are also inadequate to conduct foreign policy. See Prakash & Ramsey, *supra* note 26, at 237.



functionalist could argue that the general purposes of foreign affairs powers would be frustrated by vesting them in a slow-moving and multi-member legislative branch rather than a unitary executive capable of moving with speed, vigor, and secrecy.

In any event, proponents of executive branch dominance have triumphed in the courts and in practice, a victory driven largely by functional considerations.<sup>33</sup> In assessing the steady growth in presidential power in the twentieth century, Louis Henkin observed that although “the powers explicitly vested in [the office] are few and appear modest . . . the structure of the federal government, the facts of national life, the realities and exigencies of international relations . . . and the practices of diplomacy, have afforded Presidents unique temptations and unique opportunities to acquire unique and ever larger powers.”<sup>34</sup> Without resort to the procedure specified in the Treaty Clause, for example, the President has entered into numerous “sole-executive agreements” that were held to trump inconsistent state laws.<sup>35</sup> On the academic side, H. Jefferson Powell, among others, has made a strong case for presidential primacy, arguing that it best fits “the goals and functions of the federal government in the area of foreign affairs.”<sup>36</sup>

While functionalism was thought to favor presidential primacy, formalism has been used by both sides in the debate. The huge growth in presidential power at the expense of the other branches had, by the 1980s, provoked a backlash in the academy. In the wake of the Vietnam War and the Iran-Contra Affair, which seemed to expose deep flaws in presidential primacy, many scholars argued for formalist limits on executive power.<sup>37</sup>

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33. Prakash & Ramsey, *supra* note 26, at 238–39.

34. HENKIN, *FOREIGN AFFAIRS*, *supra* note 1, at 31. For a classic study of the growth of presidential power and its implications, see ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973).

35. See *United States v. Pink*, 315 U.S. 203, 229–30 (1942) (holding that exchange of letters by President Roosevelt resolving claims by Soviet government trumped inconsistent state laws); *United States v. Belmont*, 301 U.S. 324, 331 (1937) (similar).

36. H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 548 (1999). Powell concludes that the President's power to make foreign policy derived from “a complex mixture of textual arguments . . . structural arguments . . . [, and] on pragmatic considerations about the executive's superior capacity for actually carrying out the tasks of foreign policy.” *Id.* at 547–48.

37. See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY* 3–10 (1993) (arguing that the Declare War Clause vested the power to make war only in Congress, and that the President's war powers were limited to “repel[ling] sudden attacks” and assuming tactical control, as Commander in Chief, of war after it was declared by Congress); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 67–72 (1990) (arguing for essentialist limits on executive power); see also Pearlstein, *supra* note 28 (discussing scholars' approaches).



But originalism's rise to prominence made formalism available as a tool for proponents of presidential primacy as well. Looking afresh at the text, structure, and early practice, originalists have made innovative arguments for broad executive power in foreign affairs.<sup>38</sup> And yet, other scholars, using similar formalist methods, have reached starkly different conclusions about the original understanding of executive power.<sup>39</sup> These sorts of originalist stalemates have now become fairly common in constitutional foreign affairs scholarship, indicating a need for functionalist reinforcement.<sup>40</sup>

The terrible 9/11 attacks altered foreign affairs scholarship and magnified the importance of functionalist arguments for expansive executive power and limited judicial review.<sup>41</sup> These arguments have generally focused on threats from terrorism and weapons of mass destruction. Scholars such as Eric Posner, Adrian Vermeule, and Bruce Ackerman argue that these threats are unique in history, that formalist understandings of the Constitution are inadequate to meet them, and that they require the speed, secrecy, and unity of decision-making found only in the executive branch.<sup>42</sup> John Yoo, who had in the past made a comprehensive case for special deference using both formalist and functionalist methods, emphasized the importance of functional

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38. See Prakash & Ramsey, *supra* note 26, at 253 (arguing that the "Vesting Clause" in Article II provides the President with "residual" and non-specified foreign affairs powers).

39. See, e.g., Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 548–51 (2004) (using text and history to challenge the thesis that the Vesting Clause is a basis for broad executive foreign affairs power).

40. See Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 163 (2004) [hereinafter Ku & Yoo, *Formalism*]. Professors Ku and Yoo observe that, in the "sharp" and "bitter" debate about whether the Alien Tort Statute creates a cause of action, "neither side has convinced the other" using formalist and originalist methods. *Id.* at 154. Professors Ku and Yoo take "a different approach," conducting a functionalist, "comparative institutional analysis of the role of the courts in foreign affairs." *Id.* For an example of originalist interpretations reaching conflicting conclusions, compare Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98, 99–105 (2000) (challenging the "nationalist" view of the treaty power articulated in Restatement (Third) as inconsistent with the original understanding) with David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1079–80 (2000) (supporting the nationalist view of the treaty power as consistent with original understanding and historical practice).

41. Pearlstein, *supra* note 28.

42. See BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 170–71 (2006); ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 205 (2007). John Yoo has made both formalist and functionalist arguments for executive primacy. See, e.g., John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305, 1305 (2002) [hereinafter Yoo, *Treaty Interpretation*] (arguing for total deference to executive interpretations of treaties).



considerations after 9/11.<sup>43</sup> Similar functional justifications lie at the core of Bush administration arguments against judicial review of executive policies regarding the interrogation, detention, and trial of suspected terrorists.<sup>44</sup>

In response to these functionalist arguments and the perceived excesses of U.S. foreign policy in the twenty-first century, many scholars have returned to formalism, arguing that the Constitution's inherent limitations on government power are most valuable when they are being tested in crises.<sup>45</sup> But a few critics of broad executive power have sought to address the post-9/11 functional arguments on their own terms by returning to the Founders' purposes in creating a government with a separation of powers: (1) protecting individual rights; (2) keeping the government accountable to the electorate; and (3) effectiveness.<sup>46</sup> Deborah Pearlstein has identified two species of effectiveness: role effectiveness and raw effectiveness.<sup>47</sup> Role effectiveness means ensuring "that the specialization and competence of the branches are used together in a way necessary to run an effective government," while "raw effectiveness" involves allocating power that achieves a good outcome as a matter of policy.<sup>48</sup>

Effectiveness concerns predominate in the post-9/11 arguments for expansive executive power. Pearlstein points out that many of these arguments are based on untested assumptions about the "raw effectiveness" of certain executive competences in combating terrorism; using organization theory, she makes the case for judicial review in terrorist suspect detention schemes.<sup>49</sup> Other critics of expansive executive power have made compelling role-effectiveness arguments for judicial review, emphasizing the separation-of-powers goals of protecting individual liberty

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43. See Ku & Yoo, *Hamdan*, *supra* note 3, at 186; Ku & Yoo, *Formalism*, *supra* note 40, at 188.

44. See Pearlstein, *supra* note 28.

45. See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb*, 121 HARV. L. REV. 689 (2008); Neal K. Katyal and Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); Stephen I. Vladeck, *The Detention Power*, 22 YALE L. & POL'Y REV. 153 (2004).

46. Flaherty, *Dangerous*, *supra* note 28, at 1740, 1786 (identifying separation of powers goals of "balance," "accountability," and governmental "energy"); Pearlstein, *supra* note 28; see also Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 634 (2000) (arguing, prior to 9/11, that the separation of powers goals were the protection of fundamental rights, democracy, and professionalism).

47. Pearlstein, *supra* note 28.

48. *Id.*

49. Pearlstein observes that "there is nothing inherent in the nature of functional analysis that should point in one direction or another in resolving a separation-of-powers dispute, even in the national security context." *Id.*



and ensuring accountability.<sup>50</sup> However, these critics have not addressed the broad theory of geopolitics underlying the deferentialist arguments.<sup>51</sup>

### *B. Judicial Deference and Foreign Affairs*

While the functional arguments were classically used to advocate presidential primacy over Congress, they also have been used to tag the courts as a distant third in foreign affairs competence. Louis Henkin summed up courts' perceived incompetence: "Judge-made law, the courts must recognize, can [only] serve foreign policy . . . grossly, and spasmodically; their attempts to draw lines and make exceptions must be bound in doctrine and justified in reasoned opinions, and they cannot provide flexibility, completeness, and comprehensive coherence."<sup>52</sup> The courts largely shared this view of their own capacities, resulting in exceptional deference in foreign affairs matters. This subpart describes the major foreign affairs deference doctrines and how they differ from domestic doctrines.

#### 1. Domestic Deference

Deference is a striking departure from the norm of judicial review. The federal courts are "vested" under the Constitution with the "Judicial Power of the United States," which encompasses the interpretation of statutes and common law.<sup>53</sup> When courts defer to the executive branch's interpretation of the law, they cede some or all of this power.<sup>54</sup>

Nonetheless, deference is common, even in non-foreign affairs cases. Domestic deference to executive branch interpretation of statutes now generally falls under two frameworks, *Chevron*<sup>55</sup> and *Skidmore*.<sup>56</sup> *Chevron*

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50. See, e.g., Flaherty, *Globalization*, *supra* note 1.

51. I discuss the scholars who have addressed geopolitical theories in Part I.B.

52. HENKIN, *FOREIGN AFFAIRS*, *supra* note 1, at 140. I discuss and analyze the functional arguments for courts' foreign affairs incompetence in Part III.

53. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

54. Sullivan, *supra* note 1, at 780 ("At its core, deference is the ceding of one power in favor of another."); see also Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1073 (2008) ("Deference, then, involves a decisionmaker ("D1") setting aside its own judgment and following the judgment of another decisionmaker ("D2") in circumstances in which the deferring decisionmaker, D1, might have reached a different decision.").

55. See *Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).



is the strong deference that applies when Congress delegates lawmaking authority to an agency and intends that regulations “carry the force of law.”<sup>57</sup> This intent is manifested if the regulations are the product of a full and fair process that included public notice and comment.<sup>58</sup> Under *Chevron*, if Congress has directly decided the precise question at issue, the court follows that interpretation; but if Congress did not address the issue and the statute is silent or ambiguous, the court accepts the agency’s interpretation so long as it is “reasonable.”<sup>59</sup> *Skidmore* is the weaker deference that applies if there is no congressional intent that the regulations carry the force of law.<sup>60</sup> *Skidmore* deference is fluid and encompasses factors such as “the degree of the agency’s care, its consistency, formality, and relative expertness and . . . the persuasiveness of the agency’s position.”<sup>61</sup> The *Skidmore* factors play “little—if any” role in *Chevron*’s low-threshold reasonableness inquiry.<sup>62</sup>

Through these domestic deference doctrines, the courts sought to accommodate the rise of the administrative state and the complexity of modern governance.<sup>63</sup> Functionalism lies at the heart of *Chevron*. Because Congress almost never says whether it is delegating lawmaking authority, some scholars describe the delegation theory as a “legal fiction” or a judicial background principle against which Congress may legislate.<sup>64</sup> The Supreme Court acknowledged this difficulty in *Chevron* itself, and looked to two functional, institutional competence justifications—agency expertise

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56. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The courts apply other deference doctrines in certain specific circumstances. For a comprehensive description of these doctrines and a revisionist take on the leading role of *Chevron*, see William N. Eskridge, Jr. and Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1090–91 (2008) (analyzing and categorizing the Supreme Court’s deference decisions since *Chevron* and concluding that, contrary to conventional wisdom, the Court had employed a “continuum of deference regimes” in which *Chevron* played only “a modest role”).

57. *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

58. *Id.* at 226–27.

59. *Chevron*, 467 U.S. at 842–43.

60. See *Mead*, 533 U.S. at 228.

61. *Id.*; see generally Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235 (2007) (describing the history of *Skidmore* deference, analyzing courts’ application of the doctrine, and proposing a framework to clarify it).

62. Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 855 (2001).

63. See Posner & Sunstein, *supra* note 3, at 1220.

64. *Id.*; see also Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); Antonin Scalia, *Judicial Deference to Agency Interpretations of Law*, 1989 DUKE L.J. 511 (1989).



and political accountability, which the courts lack.<sup>65</sup> Importantly, *Chevron*'s reasonableness inquiry does not require that the agency's interpretation be consistent over time, so flexibility is often cited as a functional justification for *Chevron* deference as well.<sup>66</sup> In addition, *Chevron* has been justified as promoting uniformity, centralizing interpretation in an agency rather than a diffuse court system.<sup>67</sup> However, these functional justifications for *Chevron* assume that the agency has used full and fair process in rulemaking.

## 2. Foreign Affairs Deference

The courts generally utilize a different form of deference in foreign affairs cases.<sup>68</sup> These standards are vaguer and more sweeping than *Chevron* or *Skidmore*.

One form of foreign affairs deference has been recently dubbed by two scholars as *Curtiss-Wright* deference,<sup>69</sup> for the controversial, but highly influential, 1936 decision declaring the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."<sup>70</sup> *Curtiss-Wright* appeared to recognize independent executive branch lawmaking power in foreign affairs derived from Article II.<sup>71</sup> This obviates the need for a theory of congressional delegation and calls for deference not only when the statute is ambiguous, but when Congress has not "clearly trumped" the

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65. *Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984); see also Posner & Sunstein, *supra* note 3, at 1193–94.

66. Bradley, *Chevron*, *supra* note 1, at 673; see also *Smiley v. Citibank, N.A.*, 517 U.S. 735, 742 (1996) ("[T]he mere fact that an agency interpretation contradicts a prior agency position is not fatal since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.").

67. Bradley, *Chevron*, *supra* note 1, at 673; Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 310–13 (1988).

68. Bradley, *Chevron*, *supra* note 1, at 673–74. *But cf.* *Gonzalez v. Reno*, 212 F.3d 1338, 1349 (11th Cir. 2000) (applying *Chevron* deference to Executive Branch interpretation of an immigration statute and observing that "the authority of the executive branch to fill gaps is especially great in the context of immigration policy").

69. See generally Eskridge & Baer, *supra* note 56.

70. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). As I discuss in more detail in Part II.B, *Curtiss-Wright* offered a number of functional justifications for expansive executive power and limited judicial review rooted in a realist view of international relations.

71. Eskridge & Baer, *supra* note 56, at 1099. For an originalist argument that Article II does not create independent presidential lawmaking power, see Prakash & Ramsey, *supra* note 26, at 252–56.



executive branch interpretation.<sup>72</sup> When the Court invokes this standard, the government almost always prevails.<sup>73</sup>

But in most of these cases, the courts are deferring in another way as well: they refuse to independently evaluate the government's asserted foreign affairs interests—diplomatic, security, or military.<sup>74</sup> In *Dames & Moore v. Regan*, for instance, decided in the wake of the Iran Hostage Crisis, the Court applied *Curtiss-Wright* deference, upholding a presidential order suspending claims in U.S. courts against Iran in fulfillment of the agreement releasing the hostages, despite lack of congressional authorization.<sup>75</sup> The Court deferred to the executive determination that it was “a necessary incident to the resolution of a major foreign policy dispute between our country and another.”<sup>76</sup>

In treaty interpretation, courts give the executive branch's views “great weight.”<sup>77</sup> The standard is very murky but is generally thought to be highly deferential. David Bederman, in surveying twenty-three Supreme Court treaty interpretation cases from 1953 to 1993, concluded that the Court “plays out a dance in which it reaches the interpretive merits of a treaty case” but will “comply invariably with the executive branch's wishes.”<sup>78</sup> Robert Chesney, after surveying the sixty-seven published opinions involving treaty interpretation in all federal courts from 1984 to 2005, concluded that “the executive viewpoint does prevail in most instances,” even if lower courts are occasionally willing to reject the executive branch at first.<sup>79</sup> Martin Flaherty, however, views the treaty cases differently and

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72. Eskridge & Baer, *supra* note 56, at 1100–01; *see also, e.g.*, *Dep't of the Navy v. Egan*, 484 U.S. 518, 530, 534 (1988) (ruling against judicial review of presidential revocation of security clearances and declaring that, “unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs”).

73. Eskridge & Baer, *supra* note 56, at 1101 (concluding that the government has prevailed in each of nine cases invoking the standard since *Chevron*).

74. Bradley, *Chevron*, *supra* note 1, at 661–62; Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441, 445–47 (2005) (distinguishing between “legal deference” and “factual deference” in national security cases).

75. *Dames & Moore v. Regan*, 453 U.S. 654, 658 (1981).

76. *Id.* at 688; *see also* *Regan v. Wald*, 468 U.S. 222, 242–43 (1984) (deferring to President's determination that restricting Cuba's access to hard currency was in the interests of the United States because the money could be used to support violence and terrorism).

77. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 336 (2006) (“[W]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.”) (quoting *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)).

78. David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 1016 (1994).

79. Chesney, *supra* note 2, at 1754–55.



argues that courts would have reached the same conclusions using other tools of statutory interpretation, and that the “great weight” standard is nothing but a “blimp.”<sup>80</sup> Nonetheless, whether “great weight” deference is meaningful or just a cover, it does reveal that courts view treaties as requiring at least the appearance of exceptional deference.

Abstention from deciding an issue altogether, under the political question doctrine, is the ultimate form of deference.<sup>81</sup> The Supreme Court articulated the modern doctrine in *Baker v. Carr*.<sup>82</sup> Although, like *Chevron*, the modern doctrine contains a formal component—“a textually demonstrable constitutional commitment of the issue to a coordinate political department”—the outcome often hinges on “prudential,” or functional, considerations, particularly in foreign affairs cases.<sup>83</sup> The functional justifications for abstention under the political question doctrine fall into two categories. First, there are issues that courts are incompetent to evaluate—because they lack “judicially manageable standards” or would require “a policy determination of a kind clearly for nonjudicial discretion.”<sup>84</sup> Second, courts should not decide issues that would have collateral consequences in the form of “embarrassment” or “lack of respect” to the other branches.<sup>85</sup> Despite its declining use in domestic cases, the political question doctrine still has great force in foreign affairs.<sup>86</sup> In fact, courts have added extra-*Baker* functional justifications for abstaining in foreign affairs controversies—the difficulty of obtaining extraterritorial evidence, the high stakes involved, and the extreme sensitivity of these issues.<sup>87</sup>

### 3. Reforming and Defending the Doctrines

When the Judiciary has already accommodated superior executive competence through domestic deference, what justifies special foreign affairs deference? Although *Chevron* and *Skidmore* certainly have their critics, the foreign affairs deference doctrines have long been the subject of

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80. Flaherty, *Globalization*, *supra* note 1.

81. See Bradley, *Chevron*, *supra* note 1, at 559–60 (placing the political question doctrine on the same spectrum as other deference doctrines); Nzelibe, *supra* note 1, at 962 (same).

82. 369 U.S. 186, 209 (1962) (holding that apportionment of state legislative districts was justiciable and not a political question).

83. Nzelibe, *supra* note 1, at 948 (quoting *Baker*, 369 U.S. at 217).

84. See *Baker*, 369 U.S. at 217.

85. See *id.*

86. See generally *supra* note 1.

87. Nzelibe, *supra* note 1, at 952; see also FRANCK, *supra* note 1, at 46–58 (discussing cases).



harsh criticism and proposals for reformation.<sup>88</sup> Prominent foreign relations scholars, citing *Marbury v. Madison*'s exhortations, view special deference as an abdication of judicial responsibility and call for very little deference.<sup>89</sup> Seeking a middle path between non-deference and total deference, other scholars have sought to bring more coherence to the special deference doctrines by exporting domestic deference to foreign affairs.<sup>90</sup>

*Chevron* has also been deployed in defense of special deference. Eric Posner and Cass Sunstein use *Chevron*'s functional bases to advocate for super-strong *Chevron* deference in foreign affairs cases. Because the expertise rationale applies with more force in foreign affairs cases and the accountability rationale is at least as strong, they argue, the courts should defer to reasonable executive branch interpretations even when they take the form of litigation positions.<sup>91</sup> In other words, this "super-strong *Chevron* deference" would have courts apply the easily-satisfied reasonableness standard of *Chevron* without the process requirements that limit its application in domestic cases. It is tantamount to *Curtiss-Wright* deference.

There is no question that the foreign affairs deference doctrines badly need clarification, structure, and consistency. Many proposed reforms address the functional arguments, weighing the pragmatic considerations for

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88. See Chesney, *supra* note 2, at 1758–70 (describing the range of approaches advocated by scholars for reforming treaty deference); Sullivan, *supra* note 1, at 799–804 (same); Nzelibe, *supra* note 1, at 956 (describing proposals for limiting the use of the political question doctrine in foreign affairs).

89. See, e.g., FRANCK, *supra* note 1, at 4–5; MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 313–21 (1990); KOH, *supra* note 37, at 146–48; David Gray Adler, *Court, Constitution, and Foreign Affairs*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 19, 19–20 (1996). Curtis Bradley has labeled this the "Marbury perspective," which he describes as "a choice between two extremes: either the courts in foreign affairs cases enforce the 'rule of law' against the Executive or they abdicate their judicial function." Bradley, *Chevron*, *supra* note 1, at 650.

90. See Bradley, *Chevron*, *supra* note 1, at 726 (proposing *Chevron* deference as a tool "for understanding and limiting deference in this otherwise amorphous area" and flushing out instances of executive lawmaking); Chesney, *supra* note 2, at 1729, 1771–74 (proposing an integrated model "calibrating the degree of deference in a particular case with reference to considerations including (1) the nature of the process employed by the executive branch to generate the interpretation and (2) the subject matter of the agreement itself"); Evan Criddle, *Chevron Deference and Treaty Interpretation*, 112 YALE L.J. 1927, 1927–28 (2003) (arguing that *Skidmore* deference is "a superior paradigm for conceptualizing judicial deference to executive treaty interpretation"); Sullivan, *supra* note 1, at 799–804 (describing the range of approaches to treaty interpretation advocated by scholars); Sullivan, *supra* note 1, at 779, 812–14 (assessing the institutional competences of courts and the executive to interpret treaties, and proposing a "*Skidmore*-style" flexible scale of deference that considers the amount of executive self-interest and expertise, the type of instrument, and the consistency and process of the executive interpretation).

91. Posner & Sunstein, *supra* note 3, at 1207.



and against particular deference standards.<sup>92</sup> But these proposals do not engage with the geopolitical theory underlying the doctrines and their functional justifications.<sup>93</sup> Instead, the relative institutional foreign affairs competences are recited as common-sense observations, sometimes supported with an illustration or two.<sup>94</sup> Yet, as with all pragmatic theories of interpretation, the results reached depend on the interpreter's assumptions about the world.<sup>95</sup>

A handful of scholars have grounded discussion of functionalist arguments for deference in a theory of international relations. Jide Nzelibe defended the continued use of the political question doctrine in foreign affairs cases, using international relations realism as a starting point.<sup>96</sup> For Nzelibe, the anarchic nature of the international system—a core tenet of realism—limits the ability of courts to track the meaning of foreign affairs law, and limits their effectiveness and legitimacy in this area.<sup>97</sup> Similarly, John Yoo has argued for near-total deference to the President in treaty interpretation, citing the anarchic and political nature of the international realm.<sup>98</sup>

Other scholars have argued that recent developments in international relations will undermine the rationales for special deference over time. These scholars draw upon insights from liberalism, a competing geopolitical theory that, in contrast to realism, focuses on the internal characteristics of states, as well as transnational ties among individuals and institutions.<sup>99</sup> Peter Spiro sees the increasing non-governmental interaction among nations and their citizens, the institutionalization of international relations through transnational entities such as the WTO, and the mobility of capital as trends that will justify a decline in the use of the political question doctrine in foreign affairs, despite the impact of 9/11.<sup>100</sup> Anne-Marie Slaughter argues that the special military-political relations among liberal states “undermine the alleged difference between domestic and

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92. See, e.g., Ku and Yoo, *Hamdan*, *supra* note 3; Sullivan, *supra* note 1.

93. I describe the roots of these justifications in Part II.

94. See, e.g., Posner & Sunstein, *supra* note 3, at 1202 (describing the justifications for special deference in foreign relations as “often less textual than functional, based on traditional practices and understandings”).

95. Cf. R. George Wright, *Dependence and Hierarchy Among Constitutional Theories*, 70 BROOK. L. REV. 141, 145–61 (2004) (arguing that pragmatic theories of constitutional interpretation are ultimately dependent on rival theories).

96. See Nzelibe, *supra* note 1, at 941.

97. *Id.* I address these arguments in Part III.

98. See Yoo, *Treaty Interpretation*, *supra* note 42, at 1305.

99. See Slaughter, *International*, *supra* note 18, at 504.

100. See Spiro, *supra* note 12, at 649–50.



foreign affairs” and the justifications for the political question doctrine with respect to those states.<sup>101</sup>

Yet neither of these approaches—the dominant realist view and the alternative liberal view—uses as a starting point one of the most salient features of the twenty-first century global system—the predominance of the United States.<sup>102</sup> While the realists view special deference through the past history of great power conflict, the liberal internationalists look to the future, viewing the decline of special deference as a logical response to current trends such as globalization and the democratic peace. These approaches treat the United States as either one of many great powers or one of many liberal democracies with close ties to other liberal states. As I discuss in more detail in Part IV, the present international system, *as a whole*, corresponds to neither perspective.

### C. *The Enemy Combatant Cases: Limited Deference*

During the years following 9/11, the Supreme Court has made a substantial departure from the special deference norm in four habeas cases regarding the detention of “enemy combatants.”<sup>103</sup> These cases concerned a foreign affairs power thought to be least appropriate for judicial oversight—the authority to wage war.<sup>104</sup> Rather than apply the special deference doctrines or abstain from deciding the cases altogether under the still-vibrant political question doctrine in foreign affairs, the Supreme Court rejected the government’s functional rationales for exceptional deference each time.<sup>105</sup>

*Hamdi v. Rumsfeld* addressed the executive branch power to detain enemy combatants as part of the war against al Qaeda and the Taliban, and

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101. Slaughter Burley, *Foreign Affairs*, *supra* note 12, at 1980, 2001.

102. G. JOHN IKENBERRY, *LIBERAL ORDER & IMPERIAL AMBITION* 147 (2006) [hereinafter IKENBERRY, *IMPERIAL*].

103. For the purposes of the Combatant Status Review Tribunal (“CSRT”) proceedings at Guantánamo, an enemy combatant is defined as “an individual who was part of or supporting Taliban or al Qaeda forces,” including “any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to the Secretary of the Navy, (July 7, 2004), *available at* <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>. (ordering the establishment of CSRT proceedings). However, the Supreme Court utilized a narrower definition of “enemy combatant” in *Hamdi*. *Hamdi v. Rumsfeld*, 542 U.S. 507, 524 (2004).

104. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2294–95 (2008) (Scalia, J., dissenting).

105. *Boumediene*, 128 S. Ct. at 2261; *Hamdan v. Rumsfeld*, 548 U.S. 557, 620–24 (2006); *Hamdi*, 542 U.S. at 528–535; *Rasul v. Bush*, 542 U.S. 466, 487–88 (2004) (Kennedy, J., concurring).



the process due U.S. citizens who dispute their enemy combatant status.<sup>106</sup> The government's central argument was functional: given the courts' "limited institutional capabilities . . . in matters of military decisionmaking in connection with an ongoing conflict," courts should eschew evaluation of individual cases and decide only whether the overall detention scheme was legally authorized.<sup>107</sup> At most, the Court's role was to review for facial sufficiency a two-page declaration by a Defense Department official who had reviewed classified documents allegedly providing the legal and factual basis for an individual's detention.<sup>108</sup> The Fourth Circuit had agreed, citing the expertise and accountability justifications for *Curtiss-Wright* deference and concluding that "[n]o further factual inquiry is necessary or proper."<sup>109</sup>

The Supreme Court rejected these functional arguments.<sup>110</sup> The Court acknowledged that Congress had authorized the detention of "enemy combatants" to prevent return to the battlefield, but it was the Court's role to independently evaluate the procedures used for a detainee's challenge to his enemy combatant status.<sup>111</sup> The plurality's approach applied a domestic, functional doctrine—the *Matthews v. Eldridge*<sup>112</sup> due process balancing test—to weigh the detainee's liberty interest and the value of additional procedures against the government's interest in security and the cost of those additional procedures.<sup>113</sup> At a minimum, due process required that "a citizen-detainee . . . must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."<sup>114</sup> Rather than try to conform to these requirements, the government released Hamdi.<sup>115</sup>

On the same day as *Hamdi*, the Court issued its opinion in *Rasul v. Bush*, holding that statutory habeas jurisdiction extended to the alien detainees

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106. 542 U.S. at 516, 524. Hamdi was a U.S. citizen captured in Afghanistan and briefly held at Guantánamo. *Id.* at 510–11.

107. *Id.* at 527 (quoting Brief for Respondents at 26, *Hamdi v. Rumsfeld*, No. 03-6696 (March 29, 2004)).

108. *Id.* at 527–535.

109. *Hamdi v. Rumsfeld (Hamdi III)*, 316 F.3d 450, 459, 463 (4th Cir. 2003) (citing superior executive expertise, experience, and accountability in war-making); see also *Hamdi v. Rumsfeld (Hamdi II)*, 296 F.3d 278, 281 (4th Cir. 2002) (quoting *Curtiss-Wright* and concluding that its "great deference" extended to the capture and detention of enemy combatants).

110. *Hamdi*, 542 U.S. at 528–535.

111. *Id.*

112. 424 U.S. 319 (1976).

113. *Hamdi*, 542 U.S. at 528–535.

114. *Id.* at 533.

115. See Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y. TIMES, Oct. 12, 2004, at A15.



held at Guantánamo.<sup>116</sup> The *Rasul* holding hinged on interpretation of the habeas statute,<sup>117</sup> but Justice Kennedy, in a concurrence, directly addressed, and rejected, the government's functional arguments.<sup>118</sup> While conceding that there was "a realm of political authority over military affairs where the judicial power may not enter," Justice Kennedy concluded that the military exigencies were not sufficient to deny habeas to the detainees.<sup>119</sup> Guantánamo is "in every practical respect a United States territory, and . . . is . . . far removed from any hostilities."<sup>120</sup> And while "detention without proceedings or trial would be justified by military necessity for a matter of weeks," after months and years "the case for continued detention to meet military exigencies becomes weaker."<sup>121</sup> There was little deference to the government's asserted foreign policy requirements.

In *Hamdan v. Rumsfeld*,<sup>122</sup> the Court declared unlawful the military commissions established in 2001 to try a handful of the Guantánamo detainees for war crimes.<sup>123</sup> *Hamdan* was an across-the-board refusal to defer to the executive branch.<sup>124</sup> The majority concluded that the commissions violated the Uniform Code of Military Justice ("UCMJ") and the Geneva Conventions.<sup>125</sup> In rejecting the government's interpretations, the Court declined to apply any of the foreign affairs deference doctrines.<sup>126</sup> The UCMJ required that military commission rules be the same as for courts martial "insofar as practicable," and the President's determination of impracticability lacked any supporting record.<sup>127</sup> Under *Curtiss-Wright*

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116. 542 U.S. 466, 467 (2004).

117. *Id.* at 476 (distinguishing the facts of *Johnson v. Eisentrager*, 339 U.S. 763, 766, 777 (1950), and relying on an intervening change in the understanding for the basis of statutory habeas jurisdiction).

118. *Id.* at 486–88 (Kennedy, J., concurring).

119. *Id.* at 487–88.

120. *Id.* at 487.

121. *Id.*

122. 548 U.S. 557 (2006).

123. *Id.* at 635. As of August 2008, a dozen Guantánamo detainees have been formally charged. Human Rights Watch, US: Hamdan Trial Exposes Flaws in Military Commissions (Aug. 6, 2008), <http://www.hrw.org/en/news/2008/08/06/us-hamdan-trial-exposes-flaws-military-commissions>.

124. See Eskridge and Baer, *supra* note 56, at 1219–21 (describing the Court's approach in *Hamdan* as "anti-deference").

125. *Hamdan*, 548 U.S. at 597–602.

126. The Court did not explicitly apply *Chevron* deference either. See Ku and Yoo, *Hamdan*, *supra* note 3, at 179, 185–86.

127. *Hamdan*, 548 U.S. at 620–24 (quoting 10 U.S.C. § 836(b) (2000)). See also Uniform Code of Military Justice, 10 U.S.C. § 836 (2000), amended by Military Commissions Act of 2006, 10 U.S.C. § 836 (2006).



deference, such a record would not be required.<sup>128</sup> The commissions were unlawful because, unlike courts martial, they denied defendants the right to be present at trial and allowed hearsay evidence, including evidence obtained through coercion.<sup>129</sup> Then, without invoking “great weight” treaty deference, the Court rejected the government’s interpretation of Common Article 3 of the Geneva Conventions.<sup>130</sup> The Court held that Common Article 3, which covered individuals involved in armed conflicts “not of an international character,” applied to Hamdan because this phrase meant all conflicts not between nation-states, including the war with al Qaeda.<sup>131</sup> The military commissions, the Court concluded, violated Common Article 3’s requirement that defendants be tried by a “regularly constituted court.”<sup>132</sup> The military commissions ground to a halt.

During 2006, a previously docile Congress finally began to address the legal quagmire created by the enemy combatant detention policy, passing two statutes purporting to strip habeas jurisdiction for Guantánamo detainees and replace it with a limited, direct appeal to the D.C. Circuit from the military’s enemy combatant determination.<sup>133</sup> *Boumediene v. Bush*,<sup>134</sup> a 5-4 decision declaring the habeas-stripping provision unconstitutional, stands out as a very rare rebuff to *both* the executive branch and Congress in foreign affairs. The Court held that the Guantánamo detainees had a constitutional right to habeas and that the alternative was an inadequate substitute because it did not provide detainees the opportunity to introduce new evidence to rebut the government’s, nor did the alternative empower the D.C. Circuit to order a detainee’s release.<sup>135</sup>

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128. *See Hamdan*, 548 U.S. at 718–19 (Thomas, J., dissenting) (citing *Curtiss-Wright* and noting the failure of the majority to apply special deference).

129. *See id.* at 613–25 (plurality opinion).

130. *Id.* at 632.

131. *See id.*; *see also* COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 4–5 (Jean S. Pictet ed., 1958).

132. *Hamdan*, 548 U.S. at 635. A different, non-controlling plurality also concluded that the commissions departed from customary international law—the law of armed conflict—in charging Hamdan with conspiracy. *See id.* at 677.

133. The Detainee Treatment Act (DTA), Pub. L. No. 109-148, 119 Stat. 2680, 2739–44 (2005) (codified as amended in scattered sections of 10 U.S.C., 28 U.S.C., and 42 U.S.C. (2006)), purported to strip habeas jurisdiction for Guantánamo detainees and replace it with exclusive, but limited, review of CSRT proceedings in the D.C. Circuit. The Military Commissions Act (MCA), Pub. L. No. 109-366 (codified at 10 U.S.C. §§ 948a–950w and scattered sections of 10 U.S.C., 18 U.S.C., 28 U.S.C., and 42 U.S.C. (2006)), *inter alia*, re-established the military commissions and eliminated habeas corpus for all aliens designated as “enemy combatants” or awaiting a determination of that status.

134. 128 S. Ct. 2229 (2008).

135. *Id.* at 2250.



The opinions encapsulated the state of the current debates about foreign affairs powers. While both the majority and the dissents gave credence to formalist, originalist approaches<sup>136</sup>—examining the reach of habeas as it would have been understood at the Founding—both sides ultimately turned to functionalism.<sup>137</sup> Front-and-center were fundamental disagreements about the most effective roles for the Executive, Congress, and the Judiciary in foreign affairs.

As with the originalist stalemates in foreign affairs scholarship, Justice Kennedy's majority opinion and Justice Scalia's dissent reached conflicting conclusions about whether the original understanding of the Great Writ's reach extended to aliens at Guantánamo.<sup>138</sup> Finding the history "indeterminate," the majority turned to functional considerations, looking beyond Guantánamo's formal status as sovereign Cuban territory and making an independent assessment of the government's claimed military exigencies.<sup>139</sup> Excluding habeas at Guantánamo would give the political branches "the power to switch the Constitution on or off at will."<sup>140</sup> On the other hand, the Court concluded, "[t]he Government presents no credible arguments that the military mission . . . would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims."<sup>141</sup> The majority was careful to place limits on the reach of habeas during war and emphasized time as an important factor. Habeas would be available sometime well after capture, and only after the executive branch had made its own determination of the detainee's status; and extra allowances should be made for domestic, emergency situations.<sup>142</sup>

Nevertheless, the Court had refused to deploy special deference to the executive branch's foreign policy assessments, and the dissenters were livid. Chief Justice Roberts lamented that the American people had lost "a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges."<sup>143</sup> He argued that the detainees were actually worse off than they had been without habeas.<sup>144</sup> Justice Scalia

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136. *Id.* at 2248, 2275–77; *see id.* at 2294–96 (Scalia, J., dissenting).

137. *Id.* at 2259 (majority opinion); *id.* at 2297 (Scalia, J., dissenting).

138. *Compare id.* at 2248–49 (majority opinion) (concluding that intent and history were indeterminate on this question) *with id.* at 2294 (Scalia, J., dissenting) (concluding that the "writ does not, and never has, run in favor of aliens abroad").

139. *See id.* at 2259 (majority opinion).

140. *Id.*

141. *Id.* at 2261.

142. *Id.* at 2275–77 (explaining that where it would impose "onerous burdens on the Government . . . [courts] would be required to devise sensible rules for staying habeas corpus proceedings until the Government can comply with its requirements in a responsible way").

143. *Id.* at 2293 (Roberts, C.J., dissenting).

144. *Id.* at 2294.



accused the majority of “faux deference,” contending that it had “blundered in” where it was incompetent to “second-guess” the political branches’ decisions about “how to handle enemy prisoners in this war.”<sup>145</sup> He bluntly declared that the decision “will almost certainly cause more Americans to be killed.”<sup>146</sup>

Seemingly in response, the majority suggested that the times called for a new paradigm of role effectiveness in foreign affairs. “If, as some fear, terrorism continues to pose dangerous threats to us for years to come,” the majority reasoned, the Court may have to define the “outer boundaries” of the war powers.<sup>147</sup> But the Court invited the political branches to “engage in a genuine debate” about “how best to preserve constitutional values while protecting the Nation from terrorism.” In the war on terror, the Court’s institutional legitimacy would benefit the Executive, whose exercise of power is “vindicated, not eroded, when confirmed by the Judicial Branch.”<sup>148</sup>

*Boumediene* indicates a move away from special deference in foreign affairs, at least in the area of the detention of enemy combatants. Although the Court in *Boumediene* cited *Curtiss-Wright*, it did not afford anything like *Curtiss-Wright* deference.<sup>149</sup> In approaches to constitutional interpretation, foreign affairs still makes a difference—functional considerations dominate over formal ones. But the post-9/11 enemy combatant cases are virtually unprecedented in their rejection of the executive’s functional arguments. This could very well mark the beginning of a new understanding of the courts’ role in foreign affairs. In the rest of the Article, I explain how theories of international relations support such a change.

## II. THE REALIST ROOTS OF SPECIAL DEFERENCE

The special deference doctrines derive from general understandings about the desired institutional competences in foreign affairs. America’s ability to function and thrive as a sovereign nation is believed to depend on executive branch competences because of the way the world operates. That understanding of the world is essentially international relations realism.

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145. *Id.* at 2296, 2296 n.1 (Scalia, J. dissenting).

146. *Id.* at 2296.

147. *Id.* at 2277 (majority opinion).

148. *Id.*

149. *Id.* at 2276–77 (“In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches.”).



This section describes the key tenets of realism. It then offers an account of how a lay version of realism became part of judicial discourse, largely through the enormously influential *Curtiss-Wright* decision in 1936. The perceived exigencies of the Cold War reinforced the realist basis for special deference.

### A. Realism

Realism, in one form or another, has long been a prominent paradigm of international relations.<sup>150</sup> For 2000 years, political philosophers and scientists—from the ancient Greek historian Thucydides to the Renaissance Italian writer Nicolo Machiavelli to modern political scientists such as E.H. Carr, George F. Kennan, Henry Kissinger, and Hans J. Morganthau—have relied on realist assumptions about the world. Their shared understanding was that nation states (rather than individuals or institutions) are the basic units of action in world affairs, that each nation seeks to maximize its own power, and that states behave in more or less rational ways.<sup>151</sup> This “classical realism” focused on statecraft and saw the drive for power as a result of fundamental human nature.<sup>152</sup>

A recent incarnation, called “neorealism” or “structural realism,” was articulated in its most influential form by Kenneth Waltz in 1979.<sup>153</sup>

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150. Slaughter Burley, *Foreign Affairs*, *supra* note 12, at 1999; Jeffrey W. Legro & Andrew Moravcsik, *Is Anybody Still a Realist?*, 24 INT’L SEC. 2, 5–6 (1999) (discussing the “degeneration” of realist theory after the end of the Cold War but observing that it “remains the primary or alternative theory in virtually every major book and article addressing general theories of world politics, particularly in security affairs”); Robert Keohane, *Theory of World Politics: Structural Realism and Beyond*, in NEOREALISM AND ITS CRITICS 158, 158 (Robert O. Keohane ed., 1986) (“For over 2000 years, what Hans J. Morganthau dubbed ‘Political Realism’ has constituted the principal tradition for the analysis of international relations in Europe and its offshoots in the New World.”).

151. Keohane, *Neorealism*, *supra* note 15, at 7–9, 211 (discussing Machiavelli’s influence on realism).

152. For major works in the classical realist tradition, see, for example, E.H. CARR, *THE TWENTY YEARS CRISIS, 1919–1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS* (2d ed. 1964) (describing realism as opposed to “utopianism”); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (7th ed. 2006) (setting forth a systematic account of political realism); GEORGE F. KENNAN, *AMERICAN DIPLOMACY: EXPANDED EDITION* (1984); HENRY KISSINGER, *DIPLOMACY* (1994); MARTIN WIGHT, *POWER POLITICS* (2d ed. 1986) (analyzing the failure of the League of Nations to affect international anarchy). For a recent realist argument that the optimism during the 1990s about enduring peace among nations was similarly misplaced, see JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* (2001).

153. KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 79–98 (1979) [hereinafter WALTZ, *THEORY*]. Waltz and other realists acknowledge that the actual interactions of nations will often depart significantly from these assumptions, but observe that the value of descriptive



Building on the work of Hans Morganthau and others, Waltz sought to systematize political realism by focusing on the structure of the international order as a way of explaining the behavior of states.<sup>154</sup> In Waltz's theory, only three variables comprise the model: (1) the degree of order in the system, (2) the function of units in the system, and (3) the relative capabilities of those units.<sup>155</sup> But two of these variables are fixed—an international system is always anarchic, and all of its units, nation states, have identical functions. Thus the only salient difference among nations is the distribution of power.<sup>156</sup> This parsimonious theory has been described as “billiard balls” colliding.<sup>157</sup>

Although Waltz's spare brand of realism is not universally accepted among realists, its tripartite model provides a useful template for describing realism in general and the ways in which it has influenced the courts' and scholars' functional justifications for special deference.<sup>158</sup> As I discuss below, it is also useful for explaining why many of the justifications are no longer viable. It is therefore worth discussing each aspect in more detail.

## 1. Anarchy

When the realists describe the international realm as anarchic, they do not mean that the world is necessarily violent, but that power is decentralized.<sup>159</sup> Although there are international laws and institutions, there is no world government with the power to enforce laws.<sup>160</sup> The United Nations and the World Bank have no army or navy. Without such governing

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accuracy must be weighed against the greater explanatory and predictive power of a parsimonious theory. Kenneth N. Waltz, *Law and Theories*, in *NEOREALISM AND ITS CRITICS* 27, 34 (Robert O. Keohane ed., 1986).

154. Kenneth N. Waltz, *Political Structures*, in *NEOREALISM AND ITS CRITICS* 70, 72 (Robert O. Keohane ed., 1986) [hereinafter Waltz, *Structures*].

155. WALTZ, THEORY, *supra* note 153, at 97.

156. *See id.*

157. A. WOLFERS, DISCORD AND COLLABORATION: ESSAYS ON INTERNATIONAL POLITICS 19–24 (1962); Nexon & Wright, *supra* note 16, at 256.

158. I use Waltz's framework because it has been highly influential, and because it adheres closely to prior versions of realism, the insights of which would likely have been perceived as common wisdom by many educated laypersons. Nonetheless, realism has continued to evolve, and many realists depart significantly from Waltz's views. For example, “offensive realists” part company with Waltz's structural realism because they conclude that all states seek to dominate rather than merely survive. *See, e.g.*, MEARSHEIMER, *supra* note 152, at 20–21. For a discussion of the evolution of realism since 1979, see generally Legro & Moravcsik, *supra* note 150.

159. Kenneth N. Waltz, *Anarchic Orders and Balances of Power*, in *NEOREALISM AND ITS CRITICS* 98, 112 (Robert O. Keohane ed., 1986) [hereinafter Waltz, *Anarchic Orders*].

160. *See* MEARSHEIMER, *supra* note 152, at 30, 51.



authority, nations can never be sure if others will abide by agreements or international law, and they have no means of enforcing those agreements.<sup>161</sup> They must engage in self-help.<sup>162</sup> Because states' interests shift over time, "the world is in flux."<sup>163</sup>

Realists draw a sharp distinction between the anarchic international realm and the domestic realm—which is characterized by order and hierarchy. According to Waltz, "[n]ational politics is the realm of authority, of administration, and of law. International politics is the realm of power, of struggle, and of accommodation. The international realm is preeminently a political one."<sup>164</sup>

## 2. Sovereign States with Identical Functions

According to realists, sovereign states are the fundamental unit of the international realm. A state is sovereign in that it "decides for itself how it will cope with its internal and external problems."<sup>165</sup> Each nation is "opaque," having a unified relationship with the rest of the world.<sup>166</sup> And nations are alike in function because they provide the same things to their citizens—welfare, security, rule of law—though they may do so in different ways.<sup>167</sup> These identically-functioning nation-states are the whole ball game: realist theory discounts the role of transnational institutions, ideas, and internal characteristics of states in determining outcomes in international politics.<sup>168</sup>

## 3. The Balance of Power and *Realpolitik*

In an anarchic realm populated by nation-states that perform the same functions, states are distinguished from one another only by their power. "The units of greatest capability set the scene of action" for the rest, and so a "general theory of international politics is necessarily based on the great

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161. See, e.g., Stephen D. Krasner, *Realist Views of International Law*, 96 AM. SOC'Y INT'L L. PROC. 265, 268 (2002) ("It is naive to expect that a stable international order can be erected on normative principles embodied in international law.").

162. MEARSHEIMER, *supra* note 152, at 51; Waltz, *Anarchic Orders*, *supra* note 159, at 100.

163. MORGENTHAU, *supra* note 152, at 4–16.

164. WALTZ, THEORY, *supra* note 153, at 113.

165. *Id.*

166. Slaughter, *International*, *supra* note 18, at 5.

167. Waltz, *Structures*, *supra* note 154, at 91–92.

168. Slaughter, *International*, *supra* note 18, at 5.



powers.”<sup>169</sup> Neo-realists categorize the international system according to the number of great powers.<sup>170</sup> A system with two great powers—such as the Cold War system dominated by the Soviet Union and the United States—is bipolar. A system with more great powers is multipolar.

The result of power differentials in the world, realists predict, is a balance of power. The efforts of each great power to maximize its own capabilities will necessarily result in an equilibrium as weaker powers align to counterbalance stronger ones.<sup>171</sup> The structure of the system changes when great powers rise or fall, usually through war. Without a central authority willing or able to intervene in world affairs, each state must be prepared to use force to survive.<sup>172</sup> Realists have tended to prioritize issues surrounding the use or potential use of the military.<sup>173</sup>

Realists also make normative claims, which I will refer to as *realpolitik*.<sup>174</sup> For most realists, including Waltz, the great powers in the international system should seek stability and avoid major war.<sup>175</sup> Because a balance of power is the arrangement least likely to lead to war, realists see it as a goal of foreign policy as well as a prediction about state behavior.<sup>176</sup>

169. Kenneth N. Waltz, *Reductionist*, in *NEOREALISM AND ITS CRITICS* 47, 61 (Robert O. Keohane ed., 1986) [hereinafter Waltz, *Reductionist*].

170. Realists define a great power as “a nation that can hold its own in a war with any other nation.” Craig, *supra* note 9, at 168.

171. Some confusion surrounds the term “balance of power,” which has been used in several different ways. It can mean, *inter alia*, an actual, even distribution of power, the normative principle that power should be evenly distributed, or the tendency of the international system to produce an even distribution of power. See generally MICHAEL SHEEHAN, *THE BALANCE OF POWER: HISTORY AND THEORY* 2–4 (2000).

172. Slaughter, *International*, *supra* note 18, at 504; Waltz, *Anarchic Orders*, *supra* note 159 at 111–12.

173. Slaughter, *International*, *supra* note 18, at 504.

174. *Realpolitik* does not have a precise meaning in international relations. It was originally used to describe “policies of limited objectives which had a reasonable chance of success,” but became a broader term for the European diplomatic tradition developed during the Seventeenth through the Nineteenth Centuries, which emphasized the need for broad discretion in conducting states’ external affairs and the duty of statesmen from the great powers to “maintain an international order in which no one state dominates the rest.” MARTIN GRIFFITHS, *FIFTY KEY THINKERS IN INTERNATIONAL RELATIONS* 26 (1999) [hereinafter GRIFFITHS, *THINKERS*] (discussing Henry Kissinger’s theory and approach to foreign affairs and foreign policy). It is often associated with Henry Kissinger, who defined it as “foreign policy based on calculations of power and the national interest.” KISSINGER, *supra* note 152, at 137. It is also used as a synonym for realism. See, e.g., John K. Setear, *Room for Law: Realism, Evolutionary Biology, and the Promise(s) of International Law*, 23 *BERKELEY J. INT’L L.* 1, 1 n.3 (2005).

175. Craig, *supra* note 9, at 144; KISSINGER, *supra* note 152, at 34 (noting the “European concept of *raison d’etat*, which asserted that a state’s actions can only be judged by their success”).

176. *Id.*



*Realpolitik* requires flexibility. Because the world is anarchic and in flux, a nation must be willing to violate its own agreements and international law if necessary to advance its interests. Machiavelli wrote that the Prince may be obliged to “act against his promise, against charity, against humanity, and against religion” and “that he have a mind ready to turn itself according to the way the winds of fortune and the changeability of political affairs require.”<sup>177</sup> Acts that would be repugnant in a domestic context are fair game in the wider world.<sup>178</sup> States must not be constrained by international law if it is contrary to their interests.<sup>179</sup> A flexible foreign policy requires that it be conducted by an elite group of statesmen from the great powers who know one another, can make decisions swiftly, operate in secret if necessary, and can work out among them a stable balance of power.<sup>180</sup>

### B. *Special Deference and Realism*—Curtiss-Wright

Realism is particularly compatible with functional methods of constitutional interpretation. The demands of *realpolitik* require ultimate flexibility and discretion, but formalist modes of interpretation impose absolute limits on the exercise of power. It was functionalism that enabled realism to become part of constitutional foreign affairs law.

Although realist and functionalist conceptions of presidential power were expressed from the beginning—especially by Alexander Hamilton<sup>181</sup>—realist ideas did not begin to enter judicial discourse until the early twentieth century. The turn to realism was embodied in *Curtiss-Wright*, which rejected a challenge, on non-delegation grounds, to a joint resolution empowering the President to enforce a criminal prohibition on the sale of arms in the United States to countries engaged in a war in South America.<sup>182</sup>

177. NICOLO MACHIAVELLI, *THE PRINCE* 61 (Peter Bondanella trans., Oxford University Press 2005).

178. This is the concept of *raison d'état*, or “reason of the state;” part of the tradition of *realpolitik*. See *supra* note 175.

179. See, e.g., Krasner, *supra* note 161, at 268; see also MICHAEL J. GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER INTERVENTIONISM AFTER KOSOVO* 84 (2001) (concluding that “the use of force among states simply is no longer subject—if it ever was subject—to the rule of law”); JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 13 (2005) (“[I]nternational law does not pull states toward compliance contrary to their interests . . . and the distribution of state power.”).

180. GRIFFITHS, *THINKERS*, *supra* note 174, at 26 (explaining that Henry Kissinger believed that the struggle for power in the international system “may be contained if the great powers are led by individuals who can contrive a ‘legitimate’ order, and work out between them some consensus on the limits within which the struggle should be controlled”).

181. See Pearlstein, *supra* note 28; see also KISSINGER, *supra* note 152, at 32–36.

182. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 329 (1936).



Under the resolution, the President could choose when to impose the embargo and when to end it, and could make exceptions to its implementation, or set limits to its terms, without congressional approval.<sup>183</sup> This resolution seemed like a non-starter under the courts' then-strict application of the non-delegation doctrine.<sup>184</sup> But the Court, drawing a clear distinction between foreign and domestic affairs in constitutional law and advancing a controversial theory of extra-constitutional powers, approved the broad delegation of power to the President and offered a paean to the practical importance of an executive-centered constitutional foreign affairs framework.<sup>185</sup>

*Curtiss-Wright* has not fared well among scholars. Its broad pronouncements about foreign affairs and its theory of extra-constitutional powers have been repeatedly savaged.<sup>186</sup> But *Curtiss-Wright* continues to be cited for the proposition that the President takes the lead role in foreign affairs, and it is still the most thorough explanation by a court for why this should be so.<sup>187</sup> *Curtiss-Wright* also makes clear the realist roots of the functionalist explanations for deference to the President by the courts. This subpart discusses the roots of *Curtiss-Wright*'s realism and its impact on the special deference doctrines.

## 1. The Early Republic

The Framers were aware of realist ideas. Alexander Hamilton, whom Fareed Zakaria called "the realist father figure," drew a connection between the demands of the anarchic world and strong executive power.<sup>188</sup> In the *Federalist*, he wrote that because "the circumstances that endanger the safety of nations are infinite, no constitutional shackles can wisely be

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183. *Id.* at 312.

184. See G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999).

185. *Curtiss-Wright*, 299 U.S. at 329.

186. See, e.g., KOH, *supra* note 37, at 94 (describing "withering criticism" of *Curtiss-Wright*); Jack L. Goldsmith, *Federal Courts, Foreign Affairs and Federalism*, 83 VA. L. REV. 1617, 1659 (1997) (referring to *Curtiss-Wright* as "the *bête noire* of U.S. foreign relations law").

187. See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (describing *Curtiss-Wright*'s "historical gloss on the 'executive Power'" of Article II, which confers on the President the "vast share of responsibility for the conduct of our foreign relations" (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring))).

188. FAREED ZAKARIA, *FROM WEALTH TO POWER: THE UNUSUAL ORIGINS OF AMERICA'S ROLE IN THE WORLD* 97, 181 (1998) [hereinafter ZAKARIA, *WEALTH*].



imposed on the power to which the care of it is committed.”<sup>189</sup> And the President is better suited than Congress for conducting the *realpolitik* necessary in foreign affairs: “Decision, activity, secrecy and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number.”<sup>190</sup>

However, the courts did not adopt or discuss such functionalist institutional competence assumptions. As Edward White explained in a seminal account, formalism dominated constitutional foreign affairs jurisprudence for most of the 19th Century. Courts adhered to an “orthodox” separation of powers framework in foreign affairs, in which powers were distributed among the branches of the federal government “in accordance with a traditional, formal structure of constitutionally delegated and reserved powers.”<sup>191</sup> Under this orthodox framework, courts exercised their power to interpret foreign affairs statutes and treaties, cabining deference under the political question doctrine to a limited set of issues.<sup>192</sup> These included declarations of war or peace, jurisdiction over foreign territory, the President’s recognition of foreign governments, determination of territorial boundaries under treaties, and whether a foreign government had the power to ratify a treaty.<sup>193</sup> However, rather than abstaining from deciding the controversies altogether, the courts accepted the political branches’ determinations as conclusive.<sup>194</sup> Executive interpretations of treaties received little-to-no deference from courts, and were often rejected.<sup>195</sup>

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189. THE FEDERALIST No. 23, at 184–85 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

190. THE FEDERALIST No. 70, at 403 (Alexander Hamilton) (Isaac Kramnick ed., 1987); see also Pearlstein, *supra* note 28 (discussing the use of Hamilton by advocates of strong executive power after 9/11).

191. White, *supra* note 184, at 3.

192. See *id.*; Chesney, *supra* note 2, at 1734–41 (describing courts’ approach to treaty interpretation in the nineteenth century as consistent with Professor White’s narrative).

193. See, e.g., *United States v. One Hundred and Twenty-Nine Packages*, 27 F. Cas. 284, 288 (E.D. Mo. 1862) (No. 15,941) (“The judiciary, under the constitution, cannot declare war or make peace.”); see also Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1401 n.15 [hereinafter Goldsmith, *Formalism*] (listing cases).

194. See Goldsmith, *Formalism*, *supra* note 193, at 1400; White, *supra* note 184, at 27 (“But even in those areas, nineteenth-century courts were willing to investigate facts and to ground their decisions on legal principles, sometimes invoking those principles in support of policies declared by Congress or the Executive.”); see also *Jones v. United States*, 137 U.S. 202, 212 (1890) (holding that international law justified legislation permitting the Executive to take possession of a “guano” island and that the question of who was sovereign on the island was a political one).

195. David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497, 506–08 (2007) (surveying decisions interpreting treaties in the first fifty years of the Supreme Court and concluding that the Court



From a realist perspective, the formalist jurisprudence makes sense. At its birth, the United States was not yet a great power, though the others saw it as a potential threat.<sup>196</sup> For the most part, early American foreign policy was isolationist, seeking to avoid entanglements with the European powers that had been warring for centuries. In fact, the separation of powers was designed, or at least served, to institutionalize America's diplomatic isolation.<sup>197</sup> When the United States later became capable of engaging more fully with the rest of the world, this put increasing strain on the orthodox regime.

## 2. A Great Power

By the 1930s, the orthodox regime of constitutional foreign relations law had collapsed. Replacing it was doctrine recognizing a strong distinction between domestic and foreign realms of constitutional law, centralizing power in the Executive, and a discourse that emphasized superior executive competence in foreign affairs.<sup>198</sup> Edward White has traced the subtle moves toward functionalism in constitutional interpretation in the early twentieth century that laid the groundwork for the new regime.<sup>199</sup> Gradually, legal scholars began to conceive of constitutional powers as functionalist rather than essentialist. This led naturally to a weighing of institutional competences in determining the allocation of powers among the branches of government, rather than discerning limits that are already pre-ordained.<sup>200</sup>

But the executive discretion aspect of *Curtiss-Wright* can be traced, not only to the rise of functionalism in constitutional interpretation, but the changing nature of the U.S. government. During the early twentieth century,

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did not defer at all to Executive interpretations). *But see* John Yoo, *Rejoinder: Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305, 1310–11 (2002) (analyzing the Vesting Clause from an originalist perspective and concluding that the Framers intended a limited role for the judiciary in treaty interpretation).

196. ROBERT KAGAN, *DANGEROUS NATION* 3 (2006) (“Most Americans today would be surprised to know that much of the world regarded America, even in its infancy, as a very dangerous nation.”).

197. KISSINGER, *supra* note 152, at 32–36; Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 678–79 (1998). David Sloss has demonstrated, in a study of early Supreme Court cases and related materials, that the federal courts played an active role in implementing U.S. neutrality policy during the 1790s by providing a non-executive branch forum for the resolution of disputes involving privateers. *See generally* David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS U. L.J. 145 (2008).

198. White, *supra* note 184, at 2.

199. *See generally id.*

200. *Id.* at 47.



the Presidency steadily grew in power relative to other branches of government, along with the size of the federal bureaucracy and the scope of domestic federal regulation, culminating in the New Deal. As presidential power increased, foreign policy activism increased with it in mutually reinforcing ways.<sup>201</sup>

The devastation of World War I and the unstable international situation following it provided the backdrop for *Curtiss-Wright*.<sup>202</sup> Totalitarian regimes in the Soviet Union, Japan, Germany, and Italy seemed unlikely to abide by international law and increasingly sought their foreign policy goals through force or the threat of force. The 1930s saw the globe carved up by the great powers into closed, competing economic blocs—a German sphere of influence, the Japan-dominated “Greater East Asian Co-Prosperity Sphere,” and a British imperial preferential system, among others—that imperiled America’s access to vital markets and raw materials in Europe and Asia.<sup>203</sup> As one scholar has observed, the 1930s demonstrated that the United States could not “remain as a great industrial power within the confines of the Western hemisphere.”<sup>204</sup>

The hostile world of the 1930s and ’40s also provoked a crisis in the American foreign policy establishment and in the related community of international law scholars, who had, for most of the century, adhered to a decidedly non-realist, “classicist” approach to the world.<sup>205</sup> Classicist statesmen and scholars in the early twentieth century “hailed the creation of a new international legal order that could break out of what they believed was the discredited balance-of-power system.”<sup>206</sup> They asserted that disputes among nations could be peacefully resolved through neutral, apolitical international institutions and principles, the recognition of shared mutual interests reflected in the law, and without resort to the use of force.<sup>207</sup> The quintessential classicist document is the 1928 Kellogg-Briand Pact, a multilateral treaty outlawing war as an instrument of national policy

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201. ZAKARIA, *WEALTH*, *supra* note 188, at 10–11.

202. See Chesney, *supra* note 2, at 1739; White, *supra* note 184, at 98.

203. IKENBERRY, *IMPERIAL*, *supra* note 102, at 150–51.

204. *Id.* at 151.

205. See Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: The Twenty Years’ Crisis*, 77 S. CAL. L. REV. 583, 584–602 (2004) [hereinafter Zasloff, *Crisis*] (describing classicism and its origins as part of a narrative about its influence on U.S. foreign policy from 1921 to 1933, when “lawyers directed much of America’s relations with the outside world”); see also Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 N.Y.U. L. REV. 239, 247–57 (2003) (describing the origins and early influence of foreign policy classicism in more depth).

206. Zasloff, *Crisis*, *supra* note 205, at 584.

207. Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT’L L. 64, 65–70 (2006).



but without any enforcement mechanism.<sup>208</sup> The events of the 30s and the outbreak of World War II seemed to explode classicist principles.<sup>209</sup> After the war, realism would replace classicism as the basis of U.S. foreign policy and dominate American international law scholarship through the Cold War.<sup>210</sup>

### 3. The Realism of *Curtiss-Wright*

Despite some formalist language, *Curtiss-Wright* is a realist and functionalist decision. It essentially draws on all three major realist tenets—*anarchy*, *unitary states*, and *realpolitik*—to create a new paradigm for courts' treatment of foreign affairs issues. The author of the majority opinion, Justice George Sutherland, had caused trouble for the New Deal as one of the "Four Horsemen" generally hostile to expansive federal power.<sup>211</sup> At the same time, Sutherland saw the need for the United States to respond effectively to the turmoil of international events.<sup>212</sup> The approach he took in *Curtiss-Wright* enabled him to preserve the domestic regime of limited and enumerated powers by distinguishing the foreign from the domestic while providing the executive branch with the discretion it needed to carry out foreign policy.

Sutherland's opinion expressed the realist principle that foreign and domestic affairs are radically different because the outside world functions in a different way.<sup>213</sup> In realism, there is a sharp distinction between the hierarchy that characterizes a state's internal society and the anarchy that characterizes the international system. The *Curtiss-Wright* court drew the same distinction: unlike the domestic environment governed by separation of powers and federalism, the international system was a "vast external realm, with its important, complicated, delicate and manifold problems."<sup>214</sup>

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208. Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57; see Zasloff, *Crisis*, *supra* note 205, at 629 (concluding that the Pact was a "completely useless paper instrument, greeted with extraordinary fanfare and delusions of grandeur").

209. For a revered realist study of the failures of classicism in the inter-war period, see CARR, *supra* note 152, at 63–94.

210. Steinberg & Zasloff, *supra* note 207, at 71.

211. Michael Allan Wolf, *George Sutherland*, in *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 449, 449 (Melvin I. Urofsky ed., 1994).

212. Sutherland delivered a version of his theory in a series of lectures at Columbia in 1919, a month after the Armistice ending World War I. See White, *supra* note 184, at 57.

213. See Gil Gott, *A Tale of New Precedents: Japanese American Internment as Foreign Affairs Law*, 40 B.C. L. REV. 179, 194–202 (1998) (discussing *Curtiss-Wright* as a realist decision); Slaughter Burley, *Foreign Affairs*, *supra* note 12, at 2000 (same).

214. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936).



*Curtiss-Wright*'s expansive view of executive power clashed with that same Court's enforcing strict limitations on federal power—in particular, delegation of lawmaking to the executive branch—in the domestic realm.<sup>215</sup>

A second, and the most controversial, aspect of *Curtiss-Wright* reflected the realist assumption that states are the sole unitary actors in the international political arena. Drawing on his own earlier work, Sutherland asserted that very broad delegations of power to the Executive in foreign affairs did not offend constitutional separation-of-powers principles because the national government's foreign relations powers derived, at least in part, from extra-constitutional sources. For Sutherland, these "powers of external sovereignty" belong to all nations by virtue of their status as members "of the international family."<sup>216</sup> The inherent powers were, therefore, transferred directly to the national government of the United States from the British Crown upon independence. Because these powers never belonged to the States, they were not delegated to the federal government by the Constitution.<sup>217</sup> In realist terms, then, these powers were "dictated by the autonomous logic of the international system."<sup>218</sup> Sutherland's "inherent powers" thesis does not fully explain, but certainly suggests, why the President, rather than Congress, should be given the lead role in foreign affairs. Unlike Congress, the President is a unitary actor, like the nation itself, with respect to the rest of the world.

The third, and most important, innovation in *Curtiss-Wright* was both realist and functionalist—it drew a direct connection between the requirements of the international realm and particular executive branch competences. Here again, the Court's reasoning sounded in international relations realism. Just as from a realist perspective the anarchic character of the world system requires balancing by the great powers and the exercise of *realpolitik* by statesmen, *Curtiss-Wright* paints a picture of the President, unfettered by domestic law or other branches of the government, pursuing the interests of the United States in the arena with other great powers carefully balancing one another. Sutherland offered functional justifications for the President role as the "sole organ" in foreign affairs and why it would

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215. The Court considered *Curtiss-Wright* shortly after it had struck down three early-New Deal regulatory statutes, twice on non-delegation grounds. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 314–17 (1936) (Sutherland, J.) (invalidating a 1935 statute setting minimum prices and establishing collective bargaining in the coal industry); White, *supra* note 184, at 100–01.

216. *Curtiss-Wright*, 299 U.S. at 318.

217. White, *supra* note 184, at 104–05.

218. Slaughter Burley, *Foreign Affairs*, *supra* note 12, at 2000.



be unwise for the Court to require Congress “to lay down narrowly definite standards by which the President is to be governed.”<sup>219</sup>

Sutherland took founding-era functional justifications for vesting treaty negotiation power with the President and extrapolated them to the entire foreign affairs arena.<sup>220</sup> The President was in the position to “know[] the conditions which prevail in foreign countries” through “confidential sources of information” and “his agents in the form of diplomatic, consular, and other officials.”<sup>221</sup> Involving other branches in diplomacy could be “productive of harmful results” because secrecy would be harder to maintain.<sup>222</sup> One goal was to avoid embarrassment.<sup>223</sup> For support, Sutherland quoted from an 1816 Senate committee report concluding that the “nature of transactions with foreign nations . . . requires caution and unity of design, and their success frequently depends on secrecy and dispatch.”<sup>224</sup>

Sutherland’s opinion thus established the core set of functional justifications—expertise, avoiding embarrassment, uniformity, flexibility, speed, and secrecy—that are the pillars of special deference.

#### 4. Realism After *Curtiss-Wright*

*Curtiss-Wright* provided the basis for increased deference across the spectrum of foreign affairs doctrines. As David Gray Adler put it, even when *Curtiss-Wright*’s “sole organ” concept was “not invoked by name, its spirit, indeed its talismanic aura, has provided a common thread in a pattern of cases that has exalted presidential power above constitutional norms.”<sup>225</sup> The *Curtiss-Wright* revolution continued during the 1930s and 40s, as the international situation worsened and led to war. The Court recognized further expansions of executive power while further curtailing its own power by increasing deference. In *United States v. Belmont*<sup>226</sup> and *United*

219. *Curtiss-Wright*, 299 U.S. at 319, 322.

220. The “sole organ” language was taken, out of context, from a speech by John Marshall, then a Congressman. See Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 690 (1998).

221. *Curtiss-Wright*, 299 U.S. at 320.

222. See *id.*; see also White, *supra* note 184, at 106.

223. *Curtiss-Wright*, 299 U.S. at 320.

224. *Id.* at 319. These were the same executive competences listed by Alexander Hamilton. See THE FEDERALIST NO. 70 (Alexander Hamilton).

225. Adler, *supra* note 89, at 25; see also White, *supra* note 184, at 48 (describing Justice Sutherland as “a singularly influential force in the transformation of constitutional foreign relations jurisprudence”).

226. 301 U.S. 324, 330–33 (1937).



*States v. Pink*,<sup>227</sup> the Court held that the Roosevelt Administration's agreement, through an exchange of letters, to recognize the Soviet Union and seize Soviet assets in the U.S.—without congressional approval or via the treaty-making process—was supreme federal law, overruling inconsistent state law. The propriety of the agreement, Justice Douglas wrote in *Pink*, was a political question “not open to judicial inquiry.”<sup>228</sup> In a concurrence, Justice Frankfurter famously declared that the nation “speaks with one voice” in foreign affairs.<sup>229</sup> *Belmont* and *Pink* thus authorized an expansion of the President's power to make foreign affairs law, even affecting the private property of U.S. citizens, and near-total judicial deference to even very broad foreign policy means—e.g., claim settlement—in carrying out his power to recognize foreign governments.

World War II was the high-water mark for special deference.<sup>230</sup> During this period, the executive branch used military commissions to try hundreds of thousands of cases, and the courts took an extremely deferential approach.<sup>231</sup> In *Ex Parte Quirin*<sup>232</sup>, the Court upheld the President's use of special military commissions to try eight Nazi saboteurs, including two U.S. citizens, arrested in the United States in 1942. The commissions were established by two short executive orders providing broad parameters for the trials without any implementing regulations.<sup>233</sup> After the war, in 1946, the Court upheld the use of a commission to try a Japanese general for failing to prevent his troops in the Philippines from committing war crimes.<sup>234</sup> In that case, *In re Yamashita*, the Court deferred to the President's determinations of military necessity.<sup>235</sup> It declined to review the legality of using commissions away from the battlefield and after the end of active hostilities.<sup>236</sup> Nor would the Court review the procedural rules used by the commission, and it deferred to the President's interpretation of the Geneva Conventions.<sup>237</sup> This extreme deference prompted passionate dissents from Justices Murphy and Rutledge, who argued that America's position of strength in the post-war world required the courts to play an independent

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227. 315 U.S. 203, 231 (1942).

228. *Id.* at 223.

229. *Id.* at 242 (Frankfurter, J., concurring).

230. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006) (calling *Ex parte Quirin* the “high-water mark” for judicial deference); see also *Ex parte Quirin*, 317 U.S. 1 (1942).

231. Ku & Yoo, *Hamdan*, *supra* note 3, at 207–08.

232. 317 U.S. 1, 47–48 (1942).

233. *Id.* at 32–35.

234. *In re Yamashita*, 327 U.S. 1, 11–12 (1946).

235. *Id.* at 12–15.

236. *Id.*

237. *Id.* at 21–25.



role. Because the United States was working to create “a new era of law in the world,” Rutledge insisted, it must adhere to its own “greatest traditions of administering justice.”<sup>238</sup> Japan, a defeated and occupied power, could not bargain with the U.S. to assert its rights because it no longer held U.S. prisoners.<sup>239</sup> Rutledge concluded: “[C]ertainly, if there was the need of an independent neutral to protect her nationals during the war, there is more now [that the war had ended].”<sup>240</sup>

Justice Rutledge’s plea for the courts to provide a check on executive power perhaps reflected the brief period of American global predominance in the late 1940s.<sup>241</sup> But by 1950, the Soviet Union’s blunt assertions of power and development of nuclear weapons had made it clear that the world would be a bipolar one, and the U.S. once more needed to tend to the balance of power in Europe.<sup>242</sup> That year, the Court again upheld the use of military commissions in *Eisentrager*.<sup>243</sup> The Court would not examine the commission’s procedural rules or the political branches’ implementation of the Geneva Conventions.<sup>244</sup> And once more, the Court deferred to the executive branch’s factual assessments of military necessity: citing *Curtiss-Wright*, the Court rejected the petitioners’ argument that commissions were unwarranted in view of the fact that there were no hostilities or martial law at the time the acts were committed.<sup>245</sup>

The *Curtiss-Wright* brand of special foreign affairs deference became firmly entrenched during the Cold War under a cloud of Soviet expansionism and the risk of nuclear conflict. What Joel Paul has called “a discourse of executive expediency” in U.S. politics influenced judicial discourse.<sup>246</sup> The geopolitical situation seemed to require an increased ability for courts to shape their judgments to executive needs, particularly during crises.<sup>247</sup> During the 1960s, which were marked by high-tension

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238. *Id.* at 43 (Rutledge, J. dissenting).

239. *Id.* at 78.

240. *Id.*

241. See IKENBERRY, IMPERIAL, *supra* note 102, at 25–26 (“Viewed in terms of material capabilities, the United States did occupy an overwhelmingly powerful position at the close of the War.”).

242. *Id.* at 30–31.

243. *Johnson v. Eisentrager*, 339 U.S. 763, 785 (1950).

244. *Id.* at 789 n.14.

245. *Id.* at 789–90.

246. Paul, *supra* note 197, at 671–72.

247. Goldsmith, *Formalism*, *supra* note 193, 1408–09. The prominent exception to special deference during this period is, arguably, the Steel Seizure Case. See *Youngstown v. Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 580 (1952) (declaring unlawful President Truman’s extra-legislative seizure of domestic steel mills during the Korean War). However, although *Youngstown* is often discussed as a foreign affairs case, Justice Jackson, in his celebrated concurrence, viewed the exercise of presidential power at issue as essentially domestic. See *id.*



events such as the 1961 Cuban Missile Crisis, the courts articulated stronger deference standards and evoked functional justifications for deference in foreign affairs. In a 1961 decision, *Kolovrat v. Oregon*, the Supreme Court, for the first time, concluded that the executive branch's interpretations of treaties were entitled to "great weight."<sup>248</sup> *Baker v. Carr*, decided the following year, brought a revolution in the political question doctrine.<sup>249</sup> Rather than applying the classical, well-defined categories, courts would consider several factors, most of them functional considerations.<sup>250</sup> And instead of deferring on a particular issue in the case, courts would abstain from reviewing the government's actions altogether.<sup>251</sup> The courts still abstain under the political question doctrine relatively frequently in foreign affairs cases.<sup>252</sup> But courts have been all over the map, treating similar cases differently, resulting in "jurisprudential chaos."<sup>253</sup>

The Supreme Court continued to deploy special deference through the end of the Cold War and beyond. In *Dames & Moore*, Chief Justice Rehnquist's opinion frankly acknowledged the irresolvable dilemma caused by the realist roots of special deference—"the never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal and the Constitution

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at 645 (Jackson, J., concurring) ("We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander-in-Chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence."). Invoking the distinction between foreign and domestic realms enabled Jackson, like Sutherland before him, to confirm the existence of very broad executive power in foreign affairs while enforcing limitations on executive power in the domestic context. For a discussion of *Youngstown* as reinforcing the realist paradigm, see Gott, *supra* note 213, at 199–201. At the same time, Jackson's influential approach also enhanced the importance of functionalism in foreign affairs jurisprudence. See Stephen Vladeck, *Foreign Affairs Functionalism in Youngstown's Shadow*, 53 ST. LOUIS U. L.J. 29, 31 (2008) ("[I]n *Youngstown's* shadow, there is exceedingly little room for foreign affairs originalism in any form.").

248. *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961). In *Sumitomo Shoji Am., Inc. v. Avagliano*, the Court went further, suggesting that ambiguity was not a prerequisite for applying "great weight" deference in treaty interpretation. 457 U.S. 176, 184–85 (1982).

249. 369 U.S. 186, 209–23 (1962).

250. *See id.*

251. *See supra* notes 81–87 and accompanying text; *see also* Goldsmith, *Formalism*, *supra* note 193, at 1402.

252. *See, e.g.,* Hoxha v. Levi, 465 F.3d 554, 562 (3d Cir. 2006); Bancoult v. McNamara, 445 F.3d 427, 436 (D.C. Cir. 2006); Schneider v. Kissinger, 412 F.3d 190, 194–95 (D.C. Cir. 2005); Whiteman v. Dorotheum GmbH & Co., KG, 431 F.3d 57, 59–60 (2d Cir. 2005); Igartua-De La Rosa v. United States, 417 F.3d 145, 151 (1st Cir. 2005).

253. FRANCK, *supra* note 1, at 8; *see also* Nzelibe, *supra* note 1, at 941, 943; Goldsmith, *Formalism*, *supra* note 193, at 1399–1403.



under which we all live and which no one disputes embodies some sort of system of checks and balances.”<sup>254</sup> The requirements of *realpolitik* seem to be fundamentally at odds with the ordinary operation of the Constitution.<sup>255</sup> The Second Circuit articulated this idea near the end of the Cold War: “[i]t is evident that in today’s topsy-turvy world governments can topple and relationships can change in a moment. The Executive Branch must therefore have broad, unfettered discretion in matters involving such sensitive, fast-changing, and complex foreign relationships.”<sup>256</sup>

The courts largely accepted the idea that the anarchic nature of the world requires the President to do what is necessary to protect the nation’s interests, including exercising authority that the law does not appear to grant him. But when the President asserts that lives are at risk if the Court fails to uphold executive branch policies, how can the courts preserve a place for separation-of-powers concerns in the balance?

### III. THE FUNCTIONAL ARGUMENTS FOR SPECIAL DEFERENCE

This section explains the connection between the traditional functional justifications for special deference and particular aspects of international relations realism. These justifications engender a number of problems, many of which have already been addressed by other scholars.<sup>257</sup> But the realist bases create problems of their own, on which I focus here. In particular, drawing a sharp distinction between domestic and foreign relations issues creates boundary problems: in today’s interconnected world, domestic issues increasingly take on foreign affairs aspects. Moreover, using anarchy as a basis for deference seems to require total deference and does not, without more, explain the degree to which other separation-of-powers purposes—such as protecting individual rights and accountability—should be balanced against the effectiveness demands of anarchy and *realpolitik*.

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254. *Dames & Moore v. Regan*, 453 U.S. 654, 662 (1981).

255. Paul, *supra* note 197, at 763.

256. *Nat’l Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 554–56 (2d Cir. 1988) (relying on a U.S. government amicus brief requesting that Iran be allowed access to U.S. courts and permitting an Iranian lawsuit against a Liberian oil tanker to proceed, despite the fact that the U.S. did not recognize the government of Iran).

257. See, e.g., Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1231–35 (2007); Nzelibe, *supra* note 1, at 946–47; see generally Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 AM. J. INT’L L. 805 (1989).



*A. Anarchy*

A common justification for deference is that the President possesses superior competence due to expertise, information gathering, and political savvy in foreign affairs. These conclusions flow from the realist tenet that the external context is fundamentally distinct from the domestic context. The domestic realm is hierarchical and legal; the outside world is anarchical and political. The international realm is thus far more complex and fluid than the domestic realm. The executive is a political branch, popularly-elected and far more attuned to politics than are the courts.<sup>258</sup> Judges are, for the most part, generalists who possess no special expertise in foreign affairs.<sup>259</sup> Courts can only receive the information presented to them and cannot look beyond the record.<sup>260</sup> The President has a vast foreign relations bureaucracy to obtain and process information from around the world. Executive agencies such as the State Department and the military better understand the nature of foreign countries—their institutions and culture—and can predict responses in ways that courts cannot.<sup>261</sup>

In the context of the political question doctrine, this rationale often appears when courts conclude that an issue lacks “judicially discoverable and manageable standards.”<sup>262</sup> A stronger, related rationale is that the political branches are better suited for tracking dynamic and evolving norms in the anarchic international environment.<sup>263</sup> The meaning of international law changes over time and nations do not agree today on its meaning. Moreover, the relationships among nations in many instances will be governed by informal norms that do not correspond to international law.<sup>264</sup> In addition, many foreign affairs provisions in the Constitution had fixed meanings under international law in the Eighteenth Century—what it meant, for example, to “declare war” or to issue “letters of marque and

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258. See, e.g., *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (stating that the Chief Executive is “directly accountable to the people”).

259. See, e.g., *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) (balancing the vital national interests of the United States and foreign countries is inappropriate because “the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country”).

260. See Ku & Yoo, *Hamdan*, *supra* note 3, at 200–01.

261. Posner & Sunstein, *supra* note 3, at 1204–05.

262. *Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006); *Schneider v. Kissinger*, 412 F.3d 190, 196–97 (D.C. Cir. 2005).

263. See Nzelibe, *supra* note 1, at 979.

264. Posner & Sunstein, *supra* note 3, at 1205, 1226.



reprisal”—but subsequent practice has substantially altered their meaning or rendered them irrelevant.<sup>265</sup> Courts are not adept at tracking these shifts.

As many critics have observed, the “lack of judicially-manageable standards” argument is weak. Courts create rules to govern disputes regarding vague constitutional provisions such as the Due Process Clause.<sup>266</sup> Furthermore, if courts were to adjudicate foreign affairs disputes more often, they would have the opportunity to create clearer standards, making them more manageable.<sup>267</sup> Thus the lack-of-standards argument does not alone explain why foreign affairs should be off-limits.

The argument regarding courts’ limited access to information and lack of expertise seem persuasive at first, but it loses its force upon deeper inspection. For instance, expertise is also a rationale for *Chevron* deference in the domestic context.<sup>268</sup> Generalist judges handle cases involving highly complex and obscure non-foreign affairs issues while giving appropriate deference to interpretations of agencies charged with administering statutory schemes.<sup>269</sup> What makes foreign affairs issues so different that they justify even greater deference?<sup>270</sup> Perhaps foreign affairs issues are just an order of magnitude more complex than even the most complex domestic issues. However, this line of thinking very quickly leads to boundary problems. Economic globalization, rapid global information flow, and increased transborder movement have “radically increased the number of cases that directly implicate foreign relations” and have made foreign parties and conduct, as well as international law questions, increasingly

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265. Nzelibe, *supra* note 1, at 979; David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1859–60, 1860 n.209, 1874 (1998) (referring to the “now obsolete power to grant letters of marque and reprisal”).

266. See FRANCK, *supra* note 1, at 48–50; KOH, *supra* note 37, at 224; Nzelibe, *supra* note 1, at 978–81; Martin H. Redish, *Judicial Review and the “Political Question”*, 79 NW. U. L. REV. 1031, 1046–48 (1985).

267. Spiro, *supra* note 12, at 676–77 (“The argument that there are no applicable legal standards by which to determine a rule of decision is, first of all, alternatively circular or self-fulfilling. The sorts of issues posed by foreign relations law are not as a matter of legal interpretation inherently different from other questions of law.”).

268. See *Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

269. See Charney, *supra* note 257, at 809 (observing that “[t]he role of the judiciary in [foreign affairs] cases does not differ from that played in other cases it routinely decides. The courts are provided with the necessary information by attorneys acting in their roles as advocates . . . In purely domestic cases, novel and highly complex technical issues are regularly and successfully addressed”); see also Spiro, *supra* note 12, at 678–79.

270. See Bradley, *Chevron*, *supra* note 1, at 663–67 (observing that domestic and foreign relations matters are increasingly intertwined, undermining the expertise argument).



common in U.S. litigation.<sup>271</sup> If courts were to cabin off all matters touching on foreign relations as beyond their expertise, it would result in an ever-increasing abdication of their role.

The political norm-tracking argument reveals the second major problem with using anarchy as a basis for special deference: it fails to account for the *degree* of deference that should be afforded to the President. Under the anarchy-based argument, the meaning of treaties and other concepts in foreign affairs depend entirely on politics and power dynamics, which the President is especially competent (and the courts especially incompetent) in tracking. If this is so, the courts must give total deference to the executive branch. If one does not wish to take the position that the courts should butt out altogether in foreign affairs, there must be other reasons for the courts' involvement. Even proponents of special deference generally acknowledge that some of the courts' strengths lie in protecting individual rights and "democracy-forcing."<sup>272</sup> But what is the correct balance to strike between competing functional goals of the separation of powers?

### B. Unitary States

Other functional justifications derive from the realist tenet that the world system is populated solely by unitary states. These arguments for special deference are the least persuasive. Most importantly, they do not correspond to actual practice. But they are, at bottom, another way of articulating the more compelling *realpolitik* arguments.

#### 1. Uniformity

A common trope in the cases is that the nation "speaks with one voice" in foreign relations.<sup>273</sup> With respect to the outside world, the United States is a singular, opaque entity. The one-voice phrase comes from Justice Frankfurter's concurrence in *United States v. Pink*, a decision containing sweeping language about the limits of the states' role in foreign relations.<sup>274</sup>

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271. See Jinks & Katyal, *supra* note 257, at 1236; see also Goldsmith, *Formalism*, *supra* note 193, at 1397.

272. See Nzelibe, *supra* note 1, at 1001; Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES IN L. 1, 1 (2004) (arguing that courts, by focusing on congressional endorsement of emergency measures, create "broad-based political accountability for the actions taken [by the executive] in the name of national security").

273. *United States v. Pink*, 315 U.S. 203, 242 (1942) (Frankfurter, J., concurring).

274. See *id.* at 242 ("In our dealings with the outside world, the United States speaks with one voice and acts as one . . ."); see also *United States v. Belmont*, 301 U.S. 324, 330 (1937)



But the one-voice rationale has also been adopted in support of the executive-centered framework.<sup>275</sup>

The one-voice rationale is in a sense not functionalist at all, but a formal essentialist assertion about the scope of the Constitution's allocation of powers. To the extent that it is functional, it must rest entirely on other rationales. A potential rationale is as follows: because the President is the only unitary, centralized branch of government,<sup>276</sup> only the President can truly speak with one voice and is therefore the only branch that can suitably represent a unitary entity in the international arena.

But as has been frequently observed, the United States has never strictly spoken "with one voice" in foreign affairs.<sup>277</sup> The Constitution's text allocates foreign affairs powers to both the Congress and the President.<sup>278</sup> In practice, Congress has from time to time disagreed with the President, even regarding highly sensitive national security matters.<sup>279</sup> And the courts have, from the very beginning, rejected executive branch interpretations of treaties.<sup>280</sup> Although the separation of powers has been criticized as interfering with the ability of the United States to form a unified foreign policy, this is the government that the Constitution created.<sup>281</sup> The one-voice argument simply does not hold up to scrutiny, at least in its strong form. But there are other rationales for a weaker form—embarrassment and accountability.

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("[I]n respect of what was done here, the Executive had authority to speak as the sole organ of that government."); Spiro, *supra* note 12, at 681 ("It is the fact and features of the exogenous context that have dictated that the nation 'speak with one voice' when it comes to foreign relations . . . and that that voice not be the judiciary's").

275. *Munaf v. Geren*, 128 S. Ct. 2207, 2226 (2008) ("The Judiciary is not suited to second-guess determinations . . . that would require federal courts to . . . undermine the Government's ability to speak with one voice in this area.").

276. Although Congress and the courts are capable of speaking with one voice, only the President does so consistently. *See, e.g., U.S. v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) ("[T]he President alone has the power to speak or listen as a representative of the nation.").

277. *See, e.g., Sarah H. Cleveland, Crosby and the 'One Voice' Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 975–76 (2001).

278. Bradley, *Chevron*, *supra* note 1, at 656.

279. Nzelibe, *supra* note 1, at 965–66 (discussing examples).

280. Sullivan, *supra* note 1, at 787–93.

281. *See, e.g., Lloyd N. Cutler, To Form a Government*, 59 FOREIGN AFF. 126, 128 (1980) (noting that a shortcoming of the constitutional structure of the United States is the inability to "form a government").



## 2. Embarrassment

A related argument, and a justification for the one-voice rationale, is that the United States will be “embarrassed” by conflicting pronouncements from different branches of government. The risk of embarrassment plays a key role in the *Curtiss-Wright* homily on superior executive competence, and has been frequently mentioned in foreign affairs political question decisions since *Baker v. Carr*.<sup>282</sup>

The core of the embarrassment justification is, possibly, that U.S. diplomats will be undermined in their delicate negotiations with other nations because court decisions that conflict with executive branch policy could baffle or even offend foreign officials.<sup>283</sup> But it is difficult to argue that foreign dignitaries will fail to understand how the branches of the U.S. government can reach different interpretations of the law. America’s current structure of government has existed for almost 230 years. In the past, “other nations [were] asked to understand our complex constitutional system of checks and balances and we somehow managed to survive as a nation.”<sup>284</sup>

Other justifications that have been labeled as “embarrassment” are more compelling, however. Court proceedings could increase the risk of revealing sensitive information. Perhaps more importantly, judicial decisions could have unforeseen consequences that undermine U.S. interests, make the U.S. appear weak, and ultimately disrupt the delicate balance of power in international relations. This aspect is related to *realpolitik*, which I address in the next subpart.

## 3. Accountability

If nations are viewed as unitary entities in the international arena, there must be one governmental entity that can be held accountable for a nation’s actions in foreign affairs, and for the U.S., that can only be the executive branch. Through this executive-exclusive lens, the American public and foreign governments either do not know how to, or simply cannot, hold the

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282. See *Baker v. Carr*, 369 U.S. 186, 189, 217 (1962); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936); see also *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1203, 1207 (9th Cir. 2007); *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 378 (3d Cir. 2006); *Igartua-De La Rosa v. United States*, 417 F.3d 145, 151 (1st Cir. 2005); *Wang v. Masaitis*, 416 F.3d 992, 995–96 (9th Cir. 2005).

283. *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943) (“[C]ourts may not so exercise their jurisdiction . . . as to embarrass the executive arm of the government in conducting foreign relations.”); *Made in the USA Found. v. United States*, 242 F.3d 1300, 1318 (11th Cir. 2001) (concluding that judicial invalidation of the North American Free Trade Agreement would embarrass the President); see *Spiro*, *supra* note 12, at 678–82.

284. *Redish*, *supra* note 266, at 1052.



courts accountable for their foreign affairs decisions.<sup>285</sup> Holding courts accountable is relatively difficult because the transaction costs are high.<sup>286</sup> While the President is one officer elected every four years, the federal judiciary comprises hundreds of individuals possessing lifetime tenure, and who can only be formally held accountable through impeachment. Deferentialists also argue that the public associates the executive branch with national security and foreign affairs, but associates the courts with protecting minority rights and resolving controversies among domestic parties.<sup>287</sup>

The accountability justification generally overstates the degree to which courts are insulated from politics.<sup>288</sup> On the domestic front, Supreme Court appointments have become an increasingly prominent issue in presidential elections, at least since *Roe v. Wade* and the nominations of Robert Bork and Clarence Thomas.<sup>289</sup> Although foreign affairs have not played much of a role in these debates thus far, this is almost certainly due to the courts' generally deferential approach to foreign relations controversies. When the courts have been bolder, such as in the enemy combatant cases, they have captured the attention of policy-makers and the public, creating issues for presidential campaigns.<sup>290</sup> Moreover, accountability cuts both ways. It is a core purpose of the separation of powers.<sup>291</sup> The courts can serve an important information-forcing role that assists the People in holding the executive branch accountable for foreign affairs decisions, many of which are shrouded in secrecy.<sup>292</sup> Court cases require the government to clearly

285. Posner & Sunstein, *supra* note 3, at 1213.

286. See Jennifer Mason McAward, *Congress's Power to Block Enforcement of Federal Court Orders*, 93 IOWA L. REV. 1319, 1348–49 (2008).

287. Nzelibe, *supra* note 1, at 962.

288. See, e.g., Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 267–69 (2005) (observing that scholars have recently “begun to see that constitutional judging cannot be insulated from ‘ordinary’ politics in quite the way theory demands”).

289. See generally JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* (2007); BENJAMIN WITTES, *CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES* 6 (2006).

290. Republican presidential candidate Senator John McCain, at a town hall meeting in Pemberton, New Jersey, called the decision in *Boumediene* “one of the worst decisions in the history of this country.” Swampland, [http://www.time-blog.com/swampland/2008/06/mccain\\_slams\\_the\\_supreme\\_court.html](http://www.time-blog.com/swampland/2008/06/mccain_slams_the_supreme_court.html) (June 13, 2008, 11:31 EST).

291. See *supra* note 46 and accompanying text.

292. Deborah N. Pearlstein, *The Constitution and Executive Competence in the Post-Cold War World*, 38 COLUM. HUM. RTS. L. REV. 547, 572–73 (2007) (observing that independent assessments of intelligence failures “strongly suggest that limiting cooperation, consultation, and engagement among agencies and between the branches can compromise, rather than enhance, security efforts in areas where intelligence collection and analysis are key”).



articulate the rationales for its policies and the procedures through which those policies were enacted. Habeas corpus forces federal officers to justify their detention of individuals whose imprisonment would otherwise remain unscrutinized.<sup>293</sup>

In any event, assuming that the courts are relatively less accountable than the political branches, this aspect of the constitutional regime is accepted in the domestic context. Why should foreign affairs require faster and easier accountability? Ultimately, the one-voice arguments for special deference—for uniformity, accountability, and avoiding embarrassment—must be grounded in assumptions about the peculiar requirements of managing a great power's foreign policy in an anarchic world. These are considerations of *realpolitik*, which I discuss in the next subpart.

### C. Realpolitik

Among the most compelling functional arguments for special deference are normative considerations deriving from *realpolitik*. These arguments evoke common impressions about the conduct of foreign policy—that it is conducted in secret, that it requires rapid responses to changing conditions, and that it involves delicate negotiations between a few elites representing the interests of the great powers who were willing to violate norms in order to achieve their foreign policy ends. These qualities are believed to be necessary to further the realist goals of protecting the security of the state and maintaining a stable balance of power in a multipolar or bipolar international system.<sup>294</sup>

#### 1. Flexibility

Because the world is inherently anarchic and thus unstable, flexibility is crucial. Because the meaning of international law changes with subtly shifting power dynamics, the United States must be capable of quickly altering its interpretation of laws in order to preserve its advantage and avoid war if possible.<sup>295</sup> Like Machiavelli's Prince,<sup>296</sup> the U.S. government

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293. See John Connolly & Marc D. Falkoff, *Habeas Corpus as Information-Forcing Device* (unpublished manuscript on file with authors).

294. See *supra* Part II.A.

295. See, e.g., Nzelibe, *supra* note 1, at 980 (“In the context of foreign affairs . . . an authoritative settlement of the law across time and institutions potentially results in the creation of a constitutional straight-jacket binding the decision-making freedom of the political branches in the international arena.”).

296. See MACHIAVELLI, *supra* note 177, at 59–60.



must be willing and able to bend with the shifting political winds and transgress norms if necessary.<sup>297</sup>

On this terrain, the executive branch appears to have clear advantages over the courts. The executive branch is more capable of altering its interpretation of the law when it suits U.S. interests. The courts must work within the confines of doctrine and stare decisis.<sup>298</sup> Courts cannot weigh in on the vast majority of foreign affairs issues because they only hear the controversies that parties bring before them, and have only the power to adjudicate the issues raised.<sup>299</sup> In short, courts' status as legal, rather than political, institutions limits their flexibility.

Again, however, the anarchy-based argument for flexibility boils down to an argument for total discretion. How do the courts determine when and how much to cabin executive power? Jide Nzelibe has concluded that in cases involving individual rights, the courts should take into account their competence in adjudicating such issues while balancing the individual rights concerns against the need to defer to the executive branch's foreign policy requirements.<sup>300</sup> But if the courts lack competence to evaluate the importance of a foreign policy need, how can they competently weigh that need against the importance of protecting individual rights?

## 2. Speed

Since *Curtiss-Wright*, speed has been recognized as an important executive branch characteristic. The executive branch can reach a uniform interpretation of the law quickly, and the courts are, by comparison, quite slow.<sup>301</sup> This is understandable in a world in which subtly-shifting alliances determine the balance of power. And in the age of terrorism, speed remains a crucial component of effective foreign policy. The ace card for defenders of special deference remains the national security emergency. How can we

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297. See HARVEY C. MANSFIELD, *TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER* xix (1989) (offering an interpretation of the executive branch as a tamed version of Machiavelli's Prince, and concluding that the Constitution "would not work without a branch whose function could be accurately described . . . as getting around the constitution when necessary").

298. See HENKIN, *FOREIGN AFFAIRS*, *supra* note 1, at 220.

299. *Id.* at 5 ("The courts consider only cases, cases require proper parties and proper issues, and foreign affairs do not ordinarily provide them to the courts' satisfaction.").

300. Nzelibe, *supra* note 1, at 946.

301. See Ku & Yoo, *Formalism*, *supra* note 40, at 188 (arguing that the institutional structure of the federal judiciary—ninety-four district courts and thirteen appellate courts—inherently makes the judicial process slow).



possibly take the risk that the courts will hobble the President's efforts to protect the United States in a time of crisis?<sup>302</sup>

It is important to separate the very slender category of true emergencies from the vast category of foreign relations in general. The great majority of foreign affairs controversies do not involve the President sending troops abroad or a threatened terrorist attack, and there is very little opportunity for courts to interfere with an executive response to a crisis situation. Courts typically review the legality of presidential decisions years later.<sup>303</sup> Most of the "enemy combatants" detained at Guantánamo were captured within a few months of September 11, 2001, and arrived at Guantánamo in early 2002.<sup>304</sup> The Supreme Court did not address the detainees' constitutional right to habeas review until 2008.<sup>305</sup>

The difficulty lies in situations where the courts are asked to use their equitable powers and issue injunctions or TROs before the issues have been fully adjudicated. Here it is the courts' institutional deliberativeness that is, arguably, the problem.<sup>306</sup>

### 3. Secrecy

Since *Curtiss-Wright*, secrecy has also been invoked as a rationale for deference to the executive in foreign affairs.<sup>307</sup> Again, this evokes a multipolar world in which diplomacy is conducted in private by an elite cadre from the great powers. However, courts are capable of handling secrets—even more skillfully than Congress.<sup>308</sup> The secrecy argument is really an argument about the potential consequences of revealing secrets to non-governmental parties and the collateral consequences that would result.

302. POSNER & VERMEULE, *supra* note 42, at 272 ("To be able to respond to international crises, the President cannot be hemmed in by international treaties and Constitutional limitations, as interpreted by judges."); *see also* THE FEDERALIST NO. 70 (Alexander Hamilton).

303. Jinks & Katyal, *supra* note 257, at 1256.

304. JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 63–84 (2006).

305. *See Boumediene v. Bush*, 128 S. Ct. 2229, 2229 (2008).

306. *See* Ku & Yoo, *Formalism*, *supra* note 40, at 186–87.

307. *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982) ("[T]he conduct of foreign affairs—[is] a realm in which the Court has recognized that it would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.") (internal quotation marks omitted); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320–21 (1936).

308. *See* Pearlstein, *supra* note 28; Kenneth N. Roth, *After Guantánamo: The Case Against Preventive Detention*, 87 FOREIGN AFF. 9, 16 (2008).



#### 4. Collateral Consequences

Many of the rationales for special deference—expertise, embarrassment, uniformity, and secrecy—have, at their core, the assumption that the courts' involvement in foreign affairs will risk serious collateral consequences in international relations that courts cannot anticipate, cannot fully understand, and do not have the power to adequately address.<sup>309</sup> There are collateral consequences for court decisions in the domestic context as well. But the distinction drawn in foreign affairs reflects the tragic side of realism—that the world is inherently an unstable and dangerous place, an arena for clashes between great powers under constant threat of war. In an international system in which the balance of power is precarious and preserved only through delicate maneuvering by statesmen, the courts' involvement could risk provoking another great power and undermining these efforts.

But once again, this justification, taken to its logical conclusion, requires complete deference. If courts truly lack any sense of the collateral consequences of their foreign affairs decisions, they cannot competently weigh those consequences against competing constitutional values. Suppose that the U.S. government advances a novel interpretation of criminal statutes in order to prosecute a suspected terrorist whose release, the government insists, would create instability in a key U.S. ally in the Middle East. Under the collateral consequences justification, the court must always defer to the government's interpretation. This would eviscerate entirely the courts' statutory interpretation role whenever there is a claimed foreign affairs exigency.

#### 5. Legitimacy

Arguments for the courts' incompetence in foreign affairs also focus on legitimacy. Courts are said to lack legitimacy in this area because their ordinary power to bestow legitimacy on the other branches in the domestic context cannot function properly in the entirely political external realm. The political branches do not require the courts' blessing for their activities outside the U.S.<sup>310</sup> Furthermore, the courts seem to face a dilemma: If they contravene the executive branch, the public will view this involvement with

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309. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 386 (2000) ("We have, after all, not only recognized the limits of our own capacity to 'determin[e] precisely when foreign nations will be offended by particular acts,' but consistently acknowledged that the 'nuances' of 'the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court . . . .") (internal citations omitted).

310. See Nzelibe, *supra* note 1, at 952.



hostility, especially when national security is at stake.<sup>311</sup> But if the courts side with the President, they risk being seen as mere cogs in the government's foreign policy apparatus.<sup>312</sup>

However, some deferentialists acknowledge that courts *should* adjudicate foreign affairs cases involving individual rights claims but balance the right in question against the government's asserted foreign policy needs.<sup>313</sup> The difficulty with this approach is that, under the anarchy/*realpolitik* worldview, the government's arguments must always trump. If the courts are not competent to evaluate the importance of foreign policy necessity, then how can they weigh it against the value of individual rights? Similarly, if the courts lack legitimacy to evaluate foreign policy needs, their decisions will be perceived as lacking legitimacy whether individual rights are involved or not. Professors Ku and Yoo do not make a similar concession, at least with respect to non-citizens. They have concluded that, while the public may tolerate limited intervention to protect constitutional liberties in wartime, the public has no patience for the courts' interfering with executive prerogatives to reinforce the rights of aliens designated as enemies.<sup>314</sup> But in any event, the realist model seems to leave little room for the consideration of individual liberties, even for citizens.

#### IV. THE HEGEMONIC MODEL OF FOREIGN AFFAIRS DEFERENCE

Today's world is far different from the unstable, multipolar world of the 1930s that provided the geopolitical context for *Curtiss-Wright* or the bipolar Cold War era in which the special deference doctrines were developed. This Section describes the post-Cold War international system and introduces the hegemonic model. It then discusses the enemy combatant cases as an application of that model.

##### A. *The American-Led International System*

Much of contemporary realist theory is concerned with the balance of power. Stability in an anarchic system is created by great powers, which form "poles" in the system. During the Cold War, the respective hegemonies of the Soviet Union and the United States maintained a balance

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311. *See id.*

312. John C. Yoo, *Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act*, 20 HASTINGS INT'L & COMP. L. REV. 747, 768 (1997).

313. *See* Nzelibe, *supra* note 1, at 952.

314. *See* Ku & Yoo, *Hamdan*, *supra* note 3, at 186.



of power.<sup>315</sup> But since the fall of the Soviet Union, the United States has lacked balancing rivals and is the only nation capable of projecting military power anywhere in the world. The United States today is frequently referred to as an empire by scholars from across the political spectrum.<sup>316</sup> There is a vast literature on the United States as empire, but the aftermath of 9/11, the 2003 U.S. invasion of Iraq, and the Bush Administration foreign policy have spurred new interest in imperial theories.<sup>317</sup>

Empire and imperialism are loaded terms, to say the least, and their use is just as often normative as descriptive.<sup>318</sup> In a useful attempt to clear up confusion concerning definitions of empire, Daniel A. Nexon and Thomas Wright have identified three frameworks for describing systems with preeminent powers: *unipolarity*, *hegemony*, and *empire*.<sup>319</sup> Today's international system does not conform precisely to any of these three ideal-typical structures, but they are useful for better aligning the institutional competences model with changes in the world.

*Unipolar* orders have few ties, with a single state dominating in an anarchical system.<sup>320</sup> These types of orders remain stable when the preeminent state cannot be challenged militarily because it has overwhelming capabilities or collective action problems prevent other nations from forming counter-balancing blocs.<sup>321</sup>

American unipolarity has created a challenge for realists. Unipolarity was thought to be inherently unstable because other nations, seeking to protect their own security, form alliances to counter-balance the leading state.<sup>322</sup> But no nation or group of nations has yet attempted to challenge America's military predominance.<sup>323</sup> Although some realists predict that

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315. See Waltz, *Reductionist*, *supra* note 169, at 47.

316. Nexon & Wright, *supra* note 16, at 253 (observing that scholars on both the left and right describe the U.S. as an empire); Joseph S. Nye, Jr., *U.S. Power and Strategy After Iraq*, 82 FOREIGN AFF. 60, 60 (2005) (same).

317. See, e.g., NIAL FERGUSON, *COLOSSUS: THE RISE AND FALL OF THE AMERICAN EMPIRE* (2004); CHALMERS JOHNSON, *THE SORROWS OF EMPIRE: MILITARISM, SECRECY, AND THE END OF THE AMERICAN REPUBLIC* (2004).

318. Nexon & Wright, *supra* note 16, at 253.

319. See *id.* at 256–57.

320. ROBERT O. KEOHANE AND JOSEPH S. NYE, JR., *POWER AND INTERDEPENDENCE* 24–25 (1989).

321. See William C. Wohlforth, *The Stability of a Unipolar World*, 24 INT'L SECURITY 5, 5–6 (1999).

322. See, e.g., IKENBERRY, *IMPERIAL*, *supra* note 102, at 104 (observing that, under traditional structural realist balance of power theory, “American preponderance is unsustainable” because “it poses a danger to other states and balancing reactions are inevitable”); Waltz, *Anarchic Orders*, *supra* note 159, at 117.

323. Craig, *supra* note 9, at 144.



counter-balancing will occur or is already in some ways occurring,<sup>324</sup> William Wohlforth has offered a compelling explanation for why *true* counter-balancing, in the traditional realist sense, will probably not happen for decades.<sup>325</sup>

American unipolarity is unprecedented.<sup>326</sup> First, the United States is geographically isolated from other potential rivals, who are located near one another in Eurasia.<sup>327</sup> This mutes the security threat that the U.S. seems to pose while increasing the threats that potential rivals seem to pose to one another.<sup>328</sup> Second, the U.S. far exceeds the capabilities of all other states in every aspect of power—military, economic, technological, and in terms of what is known as “soft power.” This advantage “is larger now than any analogous gap in the history of the modern state system.”<sup>329</sup> Third, unipolarity is entrenched as the status quo for the first time since the seventeenth century, multiplying free rider problems for potential rivals and rendering less relevant all modern previous experience with balancing.<sup>330</sup> Finally, the potential rivals’ possession of nuclear weapons makes the concentration of power in the United States appear less threatening. A war between great powers in today’s world is very unlikely.<sup>331</sup>

These factors make the current system much more stable, peaceful and durable than the past multi-polar and bipolar systems in which the United States operated for all of its history until 1991. The lack of balancing means that the United States, and by extension the executive branch, faces much weaker external constraints on its exercise of power than in the past.<sup>332</sup> Therefore, the internal processes of the U.S. matter now more than any other nations’ have in history.<sup>333</sup> And it is these internal processes, as much as external developments, that will determine the durability of American unipolarity. As one realist scholar has argued, the U.S. can best ensure the

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324. See, e.g., JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* 392 (2001) (arguing that regional hegemons will arise to challenge American dominance).

325. Wohlforth, *supra* note 321, at 8.

326. *Id.* at 38.

327. Potential rivals include China, Europe, Japan, and India. See FAREED ZAKARIA, *THE POST-AMERICAN WORLD* 21 (2008) [hereinafter ZAKARIA, *AMERICAN*].

328. Stephen G. Brooks & William Wohlforth, *International Relations Theory and the Case Against Unilateralism*, 3 *PERSP. ON POL.* 509, 511 (2005) [hereinafter Brooks & Wohlforth, *Unilateralism*].

329. *Id.*

330. *Id.*

331. Stephen G. Brooks & William C. Wohlforth, *Hard Times for Soft Balancing*, 30 *INT’L SECURITY* 72, 106 (2005) [hereinafter Brooks & Wohlforth, *Hard Times*].

332. Abebe, *supra* note 12; Brooks & Wohlforth, *Hard Times*, *supra* note 331, at 108 (“[O]ther states are simply not going to force the United States to act in a more restrained manner by acting in a systematic, co-ordinated manner to check U.S. power.”).

333. Wohlforth, *supra* note 321, at 40.



stability of this unipolar order by ensuring that its predominance appears legitimate.<sup>334</sup>

*Hegemonic* orders take on hierarchical characteristics, with the preeminent power having denser political ties with other nations than in a unipolar order.<sup>335</sup> Stability in hegemonic orders is maintained in part through security guarantees and trade relationships that result in economic specialization among nations.<sup>336</sup> For example, if Nation X's security is supplied by Hegemon Y, Nation X can de-emphasize military power and focus on economic power. In a hegemonic system, the preeminent state has "the power to shape the rules of international politics according to its own interests."<sup>337</sup> The hegemon, in return, provides public goods for the system as a whole.<sup>338</sup> The hegemon possesses not only superior command of military and economic resources but "soft" power, the ability to guide other states' preferences and interests.<sup>339</sup> The durability and stability of hegemonic orders depends on other states' acceptance of the hegemon's role. The hegemon's leadership must be seen as legitimate.<sup>340</sup>

334. Stephen Walt, *Keeping the World Off-Balance*, in *AMERICA UNRIVALED: THE FUTURE OF THE BALANCE OF POWER* 121, 150 (G. John Ikenberry ed., 2002).

335. Nexon & Wright, *supra* note 16, at 253.

336. G. JOHN IKENBERRY, *AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS* 10 (2001); Nexon & Wright, *supra* note 16, at 257.

337. Michael Mastanduno, *Hegemonic Order, 9/11, and the Bush Revolution*, 5 INT'L REL. OF THE ASIA-PAC. 177, 179 (2005); see also Michael Mastanduno, *Incomplete Hegemony and Security Order in the Asia-Pacific*, in *AMERICA UNRIVALED: THE FUTURE OF THE BALANCE OF POWER*, *supra* note 334, at 187 ("The hegemonic state should be pivotal in setting the rules of the game, even if it does not prevail in every particular conflict."). For a classic study of hegemony, see ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* (1987).

338. Public goods are "nonrivalrous"—capable of being simultaneously consumed by the provider and others—and "nonexcludable"—impossible to keep others from consuming. John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1236 (2007).

339. Martin Griffiths, *Beyond the Bush Doctrine: American Hegemony and World Order*, 23 AUSTRALASIAN J. AM. STUD. 63, 63 (2004). The term "soft power" was coined by Joseph Nye. See JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* x (2004) (explaining that soft power "is the ability to get what you want through attraction rather than coercion or payments. It arises from the attractiveness of a country's culture, political ideals, and policies.").

340. Bruce Cumings, *The United States: Hegemonic Still?*, in *THE INTERREGNUM: CONTROVERSIES IN WORLD POLITICS 1989–1999*, at 285–86 (1999) ("[H]egemony is most effective when it is indirect, inclusive, plural, heterogeneous, and consensual—less a form of domination than a form of legitimate global leadership."); Randall Schweller & David Priess, *A Tale of Two Realisms: Expanding the Institutions Debate*, 41 MERSHON INT'L STUD. REV. 1, 24 (1997) ("If the hegemon adopts a benevolent strategy and creates a negotiated order based on legitimate influence and management, lesser states will bandwagon with rather than balance



The United States qualifies as a global hegemon. In many ways, the U.S. acts as a world government.<sup>341</sup> It provides public goods for the world, such as security guarantees, the protection of sea lanes, and support for open markets.<sup>342</sup> After World War II, the U.S. forged a system of military alliances and transnational economic and political institutions—such as the United Nations, NATO, the International Monetary Fund, and the World Bank—that remain in place today. The U.S. provides security for allies such as Japan and Germany by maintaining a strong military presence in Asia and Europe.<sup>343</sup> Because of its overwhelming military might, the U.S. possesses what amounts to a “quasi-monopoly” on the use of force.<sup>344</sup> This prevents other nations from launching wars that would tend to be truly destabilizing. Similarly, the United States provides a public good through its efforts to combat terrorism and confront—even through regime change—rogue states.<sup>345</sup>

The United States also provides a public good through its promulgation and enforcement of international norms. It exercises a dominant influence on the definition of international law because it is the largest “consumer” of such law and the only nation capable of enforcing it on a global scale.<sup>346</sup> The U.S. was the primary driver behind the establishment of the United Nations system and the development of contemporary treaties and institutional regimes to effectuate those treaties in both public and private international law.<sup>347</sup> Moreover, controlling international norms are

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against it.”). For the origins of this concept, see ROBERT GILPIN, *WAR AND CHANGE IN WORLD POLITICS* (1985).

341. MANDELBAUM, *supra* note 10, at 164 (referring to “the American role as the world’s government”).

342. *See id.* at 34–62 (describing the public goods provided by the United States for the world).

343. *Id.*

344. Ikenberry, *Liberalism*, *supra* note 6, at 618 (“The United States possesses a quasi-monopoly on the international use of force while the domestic institutions and behaviors of states are increasingly open to global—that is, American—scrutiny.”)

345. *See, e.g.*, MANDELBAUM, *supra* note 10, at 163 (observing that forceful U.S. measures to prevent rogue states from acquiring nuclear weapons permitted Europe and China to adopt more conciliatory postures toward those regimes); *see also* TODD SANDLER, *GLOBAL COLLECTIVE ACTION* 144–61 (2004) (applying public goods theory to the control of rogue states).

346. *See* McGinnis and Somin, *supra* note 338, at 1241–42.

347. *See* Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1210, 1227–29 (2005) (noting that “the United States has historically been a major proponent and progenitor of international law norms” and discussing U.S. influence over international economic law); Sarah Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 102 (2006) (observing that “The United States was the primary instigator behind the establishment of the UN system and the creation of modern international treaties ranging from human rights and humanitarian law to international intellectual property and international trade.”).



sometimes embodied in the U.S. Constitution and domestic law rather than in treaties or customary international law. For example, whether terrorist threats will be countered effectively depends “in large part on U.S. law regarding armed conflict, from rules that define the circumstances under which the President can use force to those that define the proper treatment of enemy combatants.”<sup>348</sup>

These public goods provided by the United States stabilize the system by legitimizing it and decreasing resistance to it. The transnational political and economic institutions created by the United States provide other countries with informal access to policymaking and tend to reduce resistance to American hegemony, encouraging others to “bandwagon” with the U.S. rather than seek to create alternative centers of power.<sup>349</sup> American hegemony also coincided with the rise of globalization—the increasing integration and standardization of markets and cultures—which tends to stabilize the global system and reduce conflict.<sup>350</sup>

The legitimacy of American hegemony is strengthened and sustained by the democratic and accessible nature of the U.S. government. The American constitutional separation of powers is an international public good. The risk that it will hinder the ability of the U.S. to act swiftly, coherently or decisively in foreign affairs is counter-balanced by the benefits it provides in permitting foreigners multiple points of access to the government.<sup>351</sup> Foreign nations and citizens lobby Congress and executive branch agencies in the State, Treasury, Defense, and Commerce Departments, where foreign policy is made.<sup>352</sup> They use the media to broadcast their point of view in an effort to influence the opinion of decision-makers.<sup>353</sup> Because the United States is a nation of immigrants, many American citizens have a specific interest in the fates of particular countries and form “ethnic lobbies” for the purpose of affecting foreign policy.<sup>354</sup> The courts, too, are accessible to foreign nations and non-citizens. The Alien Tort Statute is emerging as an

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348. See McGinnis and Somin, *supra* note 338, at 1242.

349. See, e.g., Ikenberry, *Liberalism*, *supra* note 6, at 613.

350. See *id.* at 615–16.

351. See MANDELBAUM, *supra* note 10, at 164–65.

352. The post-Cold War era has seen an acceleration in the trend that began in the mid-1970s, away from foreign policy conducted by an elite group within the executive branch toward one involving a much broader community. See John T. Tierney, *Interest Group Involvement in Congressional Foreign and Defense Policy*, in CONGRESS RESURGENT 89, 95–98 (Randall B. Ripley & James M. Lindsay eds., 1993).

353. See MANDELBAUM, *supra* note 10, at 165.

354. McGinnis & Somin, *supra* note 338, at 1245.



important vehicle for adjudicating tort claims among non-citizens in U.S. courts.<sup>355</sup>

*Empires* are more complex than unipolar or hegemonic systems. Empires consist of a “rimless-hub-and-spoke structure,” with an imperial core—the preeminent state—ruling the periphery through intermediaries.<sup>356</sup> The core institutionalizes its control through distinct, asymmetrical bargains (heterogeneous contracting) with each part of the periphery.<sup>357</sup> Ties among peripheries (the spokes) are thin, creating firewalls against the spread of resistance to imperial rule from one part of the empire to the other.<sup>358</sup> The success of imperial governance depends on the lack of a “rim.”<sup>359</sup> Stability in imperial orders is maintained through “divide and rule,” preventing the formation of countervailing alliances in the periphery by exploiting differences among potential challengers.<sup>360</sup> Divide-and-rule strategies include using resources from one part of the empire against challengers in another part and multi-vocal communication—legitimizing imperial rule by signaling “different identities . . . to different audiences.”<sup>361</sup>

Although the U.S. has often been labeled an empire, the term applies only in limited respects and in certain situations. Many foreign relations scholars question the comparison.<sup>362</sup> However, the U.S. does exercise informal imperial rule when it has routine and consistent influence over the foreign policies of other nations, who risk losing “crucial military, economic, or political support” if they refuse to comply.<sup>363</sup> The “Status of Force Agreements” (“SOFAs”) that govern legal rights and responsibilities of U.S. military personnel and others on U.S. bases throughout the world are typically one-sided.<sup>364</sup> And the U.S. occupations in Iraq and Afghanistan had a strong imperial dynamic because those regimes depended on American support.<sup>365</sup>

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355. See Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 954–55 (2008).

356. Nexon & Wright, *supra* note 16, at 258.

357. See *id.* at 259; Charles Tilly, *How Empires End*, in AFTER EMPIRE: MULTIETHNIC SOCIETIES AND NATION-BUILDING 1, 3 (K. Barkey & M. von Hagen eds., 1997).

358. Nexon & Wright, *supra* note 16, at 261–62.

359. *Id.* at 261–65.

360. *Id.* at 261–62.

361. *Id.* at 264.

362. See, e.g., NYE, *supra* note 339, at 135–36.

363. Nexon & Wright, *supra* note 16, at 266.

364. See Ryan M. Scoville, *A Sociological Approach to the Negotiation of Military Base Agreements*, 14 U. MIAMI INT'L & COMP. L. REV. 1, 6 (2006) (“With great consistency, the United States has . . . leveraged its international power to obtain base agreements that heavily favor U.S. interests over those of receiving states.”).

365. Nexon & Wright, *supra* note 16, at 266–67.



But the management of empire is increasingly difficult in the era of globalization. Heterogeneous contracting and divide-and-rule strategies tend to fail when peripheries can communicate with one another. The U.S. is less able control “the flow of information . . . about its bargains and activities around the world.”<sup>366</sup> In late 2008, negotiations on the Status of Force Agreement between the U.S. and Iraq were the subject of intense media scrutiny and became an issue in the presidential campaign.<sup>367</sup> Another classic imperial tactic—the use of brutal, overwhelming force to eliminate resistance to imperial rule—is also unlikely to be effective today. The success of counterinsurgency operations depends on winning a battle of ideas, and collateral damage is used by violent extremists, through the Internet and satellite media, to “create widespread sympathy for their cause.”<sup>368</sup> The abuses at Abu Ghraib, once public, harmed America’s “brand” and diminished support for U.S. policy abroad.<sup>369</sup> Imperial rule, like hegemony, depends on maintaining legitimacy.

### *B. Constructing a Hegemonic Model*

International relations scholars are still struggling to define the current era. The U.S.-led international order is unipolar, hegemonic, and, in some instances, imperial. In any event, this order diverges from traditional realist assumptions in important respects. It is unipolar, but stable. It is more hierarchical. The U.S. is not the same as other states; it performs unique functions in the world and has a government open and accessible to foreigners. And the stability and legitimacy of the system depends more on successful functioning of the U.S. government as a whole than it does on balancing alliances crafted by elite statesmen practicing *realpolitik*. “[W]orld power politics are shaped primarily not by the structure created by interstate anarchy but by the foreign policy developed in Washington.”<sup>370</sup> These differences require a new model for assessing the institutional competences of the executive and judicial branches in foreign affairs.

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366. *Id.* at 268.

367. See Charles Babington, *Iraq Deal Hovers over Presidential Campaign*, USA TODAY, Aug. 22, 2008, available at [http://www.usatoday.com/news/politics/2008-08-22-3316922096\\_x.htm](http://www.usatoday.com/news/politics/2008-08-22-3316922096_x.htm).

368. Colin H. Kahl, *Coin of the Realm: Is There a Future for Counter-insurgency?*, 86 FOREIGN AFF. 169, 173 (2007) (discussing the 2007 U.S. Army/Marine Corps Counter-Insurgency Manual).

369. See STEPHEN HOLMES, *THE MATADOR’S CAPE: AMERICA’S RECKLESS RESPONSE TO TERROR* 152–53 (2007).

370. Craig, *supra* note 9, at 169.



One approach would be to adapt an institutional competence model using insights from a major alternative theory of international relations—liberalism. Liberal IR theory generally holds that internal characteristics of states—in particular, the form of government—dictate states’ behavior, and that democracies do not go to war against one another.<sup>371</sup> Liberalists also regard economic interdependence and international institutions as important for maintaining peace and stability in the world.<sup>372</sup> Dean Anne-Marie Slaughter has proposed a binary model that distinguishes between liberal, democratic states and non-democratic states.<sup>373</sup> Because domestic and foreign issues are “most convergent” among liberal democracies, Slaughter reasons, the courts should decide issues concerning the scope of the political branches’ powers.<sup>374</sup> With respect to non-liberal states, the position of the U.S. is more “realist,” and courts should deploy a high level of deference.<sup>375</sup>

One strength of this binary approach is that it would tend to reduce the uncertainty in foreign affairs adjudication. Professor Nzelibe has observed that it would put courts in the difficult position of determining which countries are liberal democracies.<sup>376</sup> But even if courts are capable of making these determinations, they would still face the same dilemmas adjudicating controversies regarding non-liberal states. Where is the appropriate boundary between foreign affairs and domestic matters? How much discretion should be afforded the executive when individual rights and accountability values are at stake?

To resolve these dilemmas, an institutional competence model should be applicable to foreign affairs adjudication across the board. In constructing a new realist model, it is worth recalling that the functional justifications for special deference are aimed at addressing problems of a particular sort of role effectiveness—which allocation of power among the branches will best achieve general governmental effectiveness in foreign affairs. In the twenty-first century, America’s global role has changed, and the best means of achieving effectiveness in foreign affairs have changed as well. The international realm remains highly political—if not as much as in the past—but it is American politics that matters most. If the U.S. is truly an empire—

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371. See JOHN M. OWEN IV, *LIBERAL PEACE, LIBERAL WAR: AMERICAN POLITICS AND INTERNATIONAL SECURITY* 3–4 (1997); Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, in *DEBATING THE DEMOCRATIC PEACE* 3, 10 (Michael E. Brown, Sean M. Lynn-Jones & Steven E. Miller eds., 1996).

372. See, e.g., EDWARD D. MANSFIELD, *POWER, TRADE, AND WAR* 122 (1994).

373. Slaughter Burley, *Foreign Affairs*, *supra* note 12, at 2002.

374. *Id.* at 2002.

375. *Id.* at 2002–03.

376. See Nzelibe, *supra* note 1, at 974.



and in some respects it is—the problems of imperial management will be far different from the problems of managing relations with one other great power or many great powers. Similarly, the management of hegemony or unipolarity requires a different set of competences. Although American predominance is recognized as a salient fact, there is no consensus among realists about the precise nature of the current international order.<sup>377</sup> The hegemonic model I offer here adopts common insights from the three IR frameworks—unipolar, hegemonic, and imperial—described above.

First, the “hybrid” hegemonic model assumes that the goal of U.S. foreign affairs should be the preservation of American hegemony, which is more stable, more peaceful, and better for America’s security and prosperity, than the alternatives. If the United States were to withdraw from its global leadership role, no other nation would be capable of taking its place.<sup>378</sup> The result would be radical instability and a greater risk of major war.<sup>379</sup> In addition, the United States would no longer benefit from the public goods it had formerly produced; as the largest consumer, it would suffer the most.

Second, the hegemonic model assumes that American hegemony is unusually stable and durable.<sup>380</sup> As noted above, other nations have many incentives to continue to tolerate the current order.<sup>381</sup> And although other nations or groups of nations—China, the European Union, and India are often mentioned—may eventually overtake the United States in certain areas, such as manufacturing, the U.S. will remain dominant in most measures of capability for decades. According to 2007 estimates, the U.S. economy was projected to be twice the size of China’s in 2025.<sup>382</sup> The U.S. accounted for half of the world’s military spending in 2007 and holds enormous advantages in defense technology that far outstrip would-be competitors.<sup>383</sup> Predictions of American decline are not new, and they have thus far proved premature.<sup>384</sup>

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377. See Craig, *supra* note 9, at 169.

378. See Joseph S. Nye, Jr., *The American National Interest and Global Public Goods*, 78 INT’L AFF. 233, 239–40 (2002) (“If the largest beneficiary of a public good (for example, the United States) does not take the lead in directing disproportionate resources toward its provision, the smaller beneficiaries are unlikely to be able to produce it, because of the difficulties of organizing collective action when large numbers are involved.”).

379. See MANDELBAUM, *supra* note 10, at 98–99.

380. See *supra* notes 349–350 and accompanying text.

381. See *supra* notes 335–340 and accompanying text.

382. ZAKARIA, AMERICAN, *supra* note 327, at 181.

383. *Id.* at 181–82.

384. *Id.* at 210–11.



Third, the hegemonic model assumes that preservation of American hegemony depends not just on power, but legitimacy.<sup>385</sup> All three IR frameworks for describing predominant states—although unipolarity less than hegemony or empire—suggest that legitimacy is crucial to the stability and durability of the system. Although empires and predominant states in unipolar systems can conceivably maintain their position through the use of force, this is much more likely to exhaust the resources of the predominant state and to lead to counter-balancing or the loss of control.<sup>386</sup> Legitimacy as a method of maintaining predominance is far more efficient.

The hegemonic model generally values courts' institutional competences more than the anarchic realist model. The courts' strengths in offering a stable interpretation of the law, relative insulation from political pressure, and power to bestow legitimacy are important for realizing the functional constitutional goal of effective U.S. foreign policy. This means that courts' treatment of deference in foreign affairs will, in most respects, resemble its treatment of domestic affairs. Given the amorphous quality of foreign affairs deference, this "domestication" reduces uncertainty. The increasing boundary problems caused by the proliferation of treaties and the infiltration of domestic law by foreign affairs issues are lessened by reducing the deference gap. And the dilemma caused by the need to weigh different functional considerations—liberty, accountability, and effectiveness—against one another is made less intractable because it becomes part of the same project that the courts constantly grapple with in adjudicating domestic disputes.

The domestic deference doctrines—such as *Chevron* and *Skidmore*—are hardly models of clarity, but they are applied and discussed by the courts much more often than foreign affairs deference doctrines, and can be usefully applied to foreign affairs cases as well.<sup>387</sup> The domestic deference doctrines are a recognition that legal interpretation often depends on politics, just as it does in the international realm.<sup>388</sup> Most of the same functional rationales—expertise, accountability, flexibility, and uniformity—that are advanced in support of exceptional foreign affairs deference also undergird *Chevron*. Accordingly, *Chevron* deference provides considerable latitude for the executive branch to change its interpretation of the law to adjust to foreign policy requirements. Once courts determine that a statute is ambiguous, the reasonableness threshold is

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385. See *supra* notes 349–50 and accompanying text.

386. Recall that globalization is likely to thwart traditional methods of "divide-and-rule" in imperial structures. See *Nixon & Wright*, *supra* note 16, at 262, 268.

387. See generally *Bradley, Chevron*, *supra* note 1, at 653; *Sullivan*, *supra* note 1.

388. See *Posner & Sunstein*, *supra* note 3, at 1204–05.



easy for the agency to meet; that is why *Chevron* is “strong medicine.”<sup>389</sup> At the same time, *Chevron*’s limited application ensures that agency interpretations result from a full and fair process. Without such process, the courts should look skeptically on altered interpretations of the law.

Returning to domestic deference standards as a baseline clarifies the ways in which foreign affairs are truly “special.” The best response to the special nature of foreign affairs matters does not lie simply in adopting domestic deference on steroids. Instead, accurate analysis must also take into account the ways in which the constitutional separation of powers already accommodates the uniqueness of foreign affairs. Many of the differences between domestic and foreign affairs play out not in legal doctrine, but in the relationship between the President and Congress. Under the hegemonic model, courts would still wind up deferring to executive branch interpretations much more often in foreign affairs matters because Congress is more likely to delegate law-making to the executive branch in those areas.<sup>390</sup>

Nonetheless, foreign relations remain special, and courts must treat them differently in one important respect. In the twenty-first century, speed matters, and the executive branch alone possesses the ability to articulate and implement foreign policy quickly. Even non-realists will acknowledge that the international realm is much more susceptible to crisis and emergency than the domestic realm. But speed remains more important even to non-crisis foreign affairs cases.<sup>391</sup> It is true that the stable nature of American hegemony will prevent truly destabilizing events from happening without great changes in the geopolitical situation—the sort that occur over decades. The United States will not, for some time, face the same sorts of existential threats as in the past.<sup>392</sup> Nonetheless, in foreign affairs matters, it is only the executive branch that has the capacity successfully to conduct

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389. Thomas Merrill & Kristin Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 859 (“The *Chevron* decision requires courts to accept any agency interpretation that is reasonable, even if it is not the interpretation that the court finds most plausible.”).

390. Examples include the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–06 (2006), and the Trading with the Enemy Act of 1917, 50 U.S.C. app. §§ 1–5 (1994). See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–39 (1952) (Jackson, J., concurring) (offering an influential framework in which the President’s powers in foreign affairs are highest when supported by congressional approval).

391. See Posner & Sunstein, *supra* note 3, at 1204.

392. See Fareed Zakaria, *True or False: We Need a Wartime President*, NEWSWEEK, July 14, 2008, at 48 (rejecting arguments that al Qaeda or Iran represent existential threats to the United States). But see PHILIP BOBBIT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* 202 (2006) (“An existential threat is precisely the sort of threat that terror poses.”).



treaty negotiations, for example, which depend on adjusting positions quickly.

The need for speed is particularly acute in crises. Threats from transnational terrorist groups and loose nuclear weapons are among the most serious problems facing the United States today. The United States maintains a “quasi-monopoly on the international use of force,”<sup>393</sup> but the rapid pace of change and improvements in weapons technology mean that the executive branch must respond to emergencies long before the courts have an opportunity to weigh in. Even if a court was able to respond quickly enough, it is not clear that we would want courts to adjudicate foreign affairs crises without the deliberation and opportunities for review that are essential aspects of their institutional competence. Therefore, courts should grant a higher level of deference to executive branch determinations in deciding whether to grant a temporary restraining order or a preliminary injunction in foreign affairs matters. Under the super-strong *Curtiss-Wright* deference scheme, the court should accept the executive branch interpretation unless Congress has specifically addressed the matter and the issue does not fall within the President’s textually-specified Article I powers.

But there are limits. Although speed matters a great deal during crises, its importance diminishes over time and other institutional competences assume greater importance. When decisions made in response to emergencies are cemented into policy over the course of years, the courts’ institutional capabilities—information-forcing and stabilizing characteristics—serve an important role in evaluating those policies.<sup>394</sup> Once a sufficient amount of time has passed, the amount of deference given to executive branch determinations should be reduced so that it matches domestic deference standards.

One of the core realist arguments for deference, the risk of collateral consequences, carries far less weight under a hegemonic model. Court decisions have consequences for third parties in the domestic realm all of the time. Given the hierarchical nature of U.S. hegemony, the response from other nations is likely to be more similar to the response by domestic parties than in the past. A typical example invoked by deferentialists involves a court decision—for example, recognizing the government of Taiwan—that angers the Chinese government.<sup>395</sup> Although such a scenario is not out of the question, there are several reasons why the consequences would not be as dire as often predicted by deferentialists. American military dominance

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393. Ikenberry, *Liberalism*, *supra* note 6, at 618.

394. Pearlstein, *supra* note 28, at 61.

395. See Posner & Sunstein, *supra* note 3, at 1213 n.145.



makes it highly unlikely that war would result from such an incident.<sup>396</sup> Moreover, China, too, cares about legitimacy and is far more likely to retaliate in some other way, possibly harming the United States' interests, but through means that would capture attention in the U.S. domestic realm, leading to accountability opportunities. Assuming that the decision is non-constitutional, the Chinese government could seek to have its preferred interpretation enacted into law.

Indeed, it is entirely possible that other nations would be content with conflicting decisions from different branches of the U.S. government. Suppose that the President roundly condemns the offensive court decision and declares the judge to be an "activist." If the damage done by the court decision was largely dignitary, an angry denouncement from the executive branch may be all that is needed. Past empires relied on multi-vocal signaling to maintain imperial rule.<sup>397</sup> But with the advent of globalization, intra-executive branch multi-vocality is much more difficult because advances in communication permit various parts of the "rim" to communicate with one another.<sup>398</sup> The American separation-of-powers system provides a way around this problem, allowing the U.S. government to "speak in different voices" at once.

### *C. Applying the Hegemonic Model: The Enemy Combatant Cases*

In the wake of 9/11, the United States invaded Afghanistan and toppled the Taliban government.<sup>399</sup> Thousands of men, most captured by our allies in Pakistan and Afghanistan (but also many other places around the world), were transferred to U.S. custody and detained in a network of prisons stretching from Afghanistan to Eastern Europe to Asia to Guantánamo Bay, Cuba.<sup>400</sup> The President made an executive determination that all detainees held at Guantánamo were "enemy combatants," and that the law of armed conflict—specifically, the Geneva Conventions—did not apply to them.<sup>401</sup>

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396. See Wang Jisi, *China's Search for Stability with America*, 84 FOREIGN AFF. 39, 39–40 (2005) (noting that "for the next several years, Washington will not regard Beijing as its main security threat, and China will avoid antagonizing the United States").

397. Nexon & Wright, *supra* note 16, at 264.

398. See *supra* notes 366–69 and accompanying text.

399. See MARGULIES, *supra* note 304, at 3.

400. See, e.g., Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

401. See Memorandum from John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, to William J. Haynes, II, General Counsel, Department of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees, Jan. 9, 2002, *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 71 (Karen Greenberg & Joshua Dratel eds., 2005) (concluding that the Geneva Conventions did not apply to the conflict with the Taliban and



The detainees were deliberately held in places where they were thought to have no rights under the U.S. Constitution or any other domestic law.<sup>402</sup> In 2003, the United States invaded Iraq, disrupting relationships with allies and leading to a decline in support around the world for U.S. foreign policy.<sup>403</sup> Theories of American Empire became a hot topic of discussion in the time leading up to, and following, the Iraq invasion.<sup>404</sup> Meanwhile, the Guantánamo detainees began to file habeas claims and the litigation wound its way up to the Supreme Court.<sup>405</sup> The Abu Ghraib prison abuse scandal broke in May 2004,<sup>406</sup> a month before the Court decided *Rasul*,<sup>407</sup> which was the first enemy combatant case and appeared to herald a shift in the Court's approach to special deference.

The Court may be finally adjusting to the reality of American power. The U.S. has been a global hegemon since 1991 and has used military means to enforce international law norms: for example, the U.S.-led bombing of Serbia in 1998 halted ethnic cleansing in Kosovo.<sup>408</sup> But the scope and impact of America's projection of power since 9/11 has underscored the significance of its unique status. The classic realist view of the world—with great powers achieving a consensus that preserves a precarious balance of power—no longer fits.<sup>409</sup> Accordingly, the institutional competences most valued for achieving governmental effectiveness in foreign affairs in the classic realist world (with the exception of speed) have become less important, and other competences have become more important.

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Al-Qaeda); Memorandum from President George W. Bush to the Vice President, et al., Humane Treatment of al Qaeda and Taliban Detainees, Feb. 7, 2002, *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 134 (Karen Greenberg & Joshua Dratel eds., 2005) (determining that all detainees held at Guantánamo are “unlawful enemy combatants”).

402. See Memorandum from Patrick F. Philbin & John C. Yoo, Deputy Assistant Attorneys Gen., Office of Legal Counsel, U.S. Dep't of Justice, to William J. Haynes II, Gen. Counsel, U.S. Dep't of Def. 6–8 (Dec. 28, 2001) (regarding possible habeas jurisdiction over aliens held in Guantánamo Bay, Cuba), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/01.12.28.pdf>.

403. See Holmes, *supra* note 369, at 68, 82–91.

404. See, e.g., NYE, *supra* note 339, at 25.

405. See MARGULIES, *supra* note 304, at 158.

406. *Id.*

407. See *id.*

408. See Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683, 1690 (2000) (arguing that “[m]ilitary action to aid the Kosovar Albanians was the right thing to do”); Ruth S. Wedgwood, *NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828, 828 (1999) (noting that NATO's action in Kosovo “may also mark the emergence of a limited and conditional right of humanitarian intervention” in international law).

409. Craig, *supra* note 9, at 168.



Nonetheless, since 9/11, differentialists have argued that the classic realist justifications for special deference apply with even more force to the war on terror.<sup>410</sup> This is the constitutional equivalent of a problem that has hobbled U.S. foreign policy in the twenty-first century—the persistence of Cold War paradigms in strategic thinking. Administration officials, in the early days after 9/11, tended to lump together terrorist groups such as al Qaeda and rogue states such as Iraq into one common existential enemy to occupy the position of the former Soviet Union.<sup>411</sup> The threat posed by al Qaeda is different because it cannot hope to remove the U.S. from its position as global hegemon—only another great power could do that. Instead, the terrorist threat presents a challenge of hegemonic management that can only be met by the combined effort of all branches of the U.S. government. In the enemy combatant cases, the Court seems to have recognized this shift and asserted its authority. But whether or not the enemy combatant cases were decided with these sorts of broad geopolitical concerns in mind, the changed hegemonic order justifies the jurisprudence.

The Bush Administration's detainee policy made clear that—due to America's power—the content of *enforceable* international law applicable to the detainees would largely depend on interpretation by the U.S. government. Under the classic realist paradigm, international law is less susceptible to judicial comprehension because it cannot be taken at face value; its actual, enforceable meaning depends on ever-shifting political dynamics and complex relationships among great powers. But in a hegemonic system, while enforceable international legal norms may still be political, their content is heavily influenced by the politics of one nation—the United States.<sup>412</sup> As an institution of that same government, the courts are well-positioned to understand and interpret international law that has been incorporated into U.S. law. Because the courts have the capacity to track international legal norms, there was no longer a justification for exceptional deference to the Administration's interpretation of the Geneva Conventions as applied to the detainees.

Professors Posner and Sunstein have argued for exceptional deference on the ground that, unless the executive is the voice of the nation in foreign affairs, other nations will not know whom to hold accountable for foreign policy decisions.<sup>413</sup> But the Guantánamo litigation demonstrated that American hegemony has altered this classic assumption as well. The

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410. See, e.g., Ku & Yoo, Hamdan, *supra* note 3, at 186.

411. See HOLMES, *supra* note 369, at 153.

412. See Craig, *supra* note 9, at 168.

413. See Posner & Sunstein, *supra* note 3, at 1199; *supra* notes 285–87 and accompanying text.



transparent and accessible nature of the U.S. government made it possible for other nations to be informed about the detainee policy and, conceivably, to have a role in changing it. The Kuwaiti government hired American attorneys to represent their citizens held at Guantánamo.<sup>414</sup> In the enemy combatant litigation, the government was forced to better articulate its detainee policies, justify the detention of each detainee, and permit attorney visits with the detainees.<sup>415</sup> Other nations learned about the treatment of their citizens through the information obtained by attorneys.<sup>416</sup>

Although the political climate in the U.S. did not enable other nations to have an effect on detainee policy directly—and Congress, in fact, acted twice to limit detainees' access to the courts<sup>417</sup>—this was an exceptional situation. Foreign governments routinely lobby Congress for favorable foreign affairs legislation, and are more successful with less politically-charged issues.<sup>418</sup> Even “rogue states” such as Myanmar have their lobbyists in Washington.<sup>419</sup> In addition, foreign governments facing unfavorable court decisions can and do appeal or seek reversal through political channels.<sup>420</sup> The accessibility and openness of the U.S. government is not a scandal or weakness; instead, it strengthens American hegemony by giving other nations a voice in policy, drawing them into deeper relationships that serve America's strategic interests.<sup>421</sup> In the Guantánamo litigation, the courts served as an important accountability mechanism when the political branches were relatively unaccountable to the interests of other nations.

The hegemonic model also reduces the need for executive branch flexibility, and the institutional competence terrain shifts toward the courts. The stability of the current U.S.-led international system depends on the ability of the U.S. to govern effectively. Effective governance depends on, among other things, predictability.<sup>422</sup> G. John Ikenberry analogizes America's hegemonic position to that of a “giant corporation” seeking foreign investors: “The rule of law and the institutions of policy making in a democracy are the political equivalent of corporate transparency and

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414. Neil Macfarquhar, *Kuwaitis Press U.S. Over 12 Held at Guantánamo*, N.Y. TIMES, June 26, 2002, at A18.

415. WITTES, *supra* note 289, at 17.

416. Carol D. Leonnig, *Further Detainee Abuse Alleged*, WASH. POST, Dec. 26, 2004, at A1.

417. See *supra* note 133 and accompanying text.

418. See John T. Tierney, *Interest Group Involvement in Foreign and Defense Policy*, in CONGRESS RESURGENT, *supra* note 352, at 95–97.

419. Michael Isikoff, *A Convention Quandary*, NEWSWEEK, May 19, 2008, at 5.

420. Spiro, *supra* note 12, at 649.

421. IKENBERRY, IMPERIAL, *supra* note 102, at 191.

422. G. John Ikenberry, *American Unipolarity: The Sources of Persistence and Decline*, in AMERICA UNRIVALED: THE FUTURE OF THE BALANCE OF POWER, *supra* note 334, at 293–94.



accountability.”<sup>423</sup> Stable interpretation of the law bolsters the stability of the system because other nations will know that they can rely on those interpretations and that there will be at least some degree of enforcement by the United States. At the same time, the separation of powers serves the global-governance function by reducing the ability of the executive branch to make “abrupt or aggressive moves toward other states.”<sup>424</sup>

The Bush Administration’s detainee policy, for all of its virtues and faults, was an exceedingly aggressive departure from existing norms, and was therefore bound to generate intense controversy. It was formulated quickly, by a small group of policy-makers and legal advisors without consulting Congress and over the objections of even some within the executive branch.<sup>425</sup> Although the Administration invoked the law of armed conflict to justify its detention of enemy combatants, it did not seem to recognize limits imposed by that law.<sup>426</sup> Most significantly, it designed the detention scheme around interrogation rather than incapacitation and excluded the detainees from all legal protections of the Geneva Conventions.<sup>427</sup> It declared all detainees at Guantánamo to be “enemy combatants” without establishing a regularized process for making an individual determination for each detainee.<sup>428</sup> And when it established the military commissions, also without consulting Congress, the Administration denied defendants important procedural protections.<sup>429</sup>

In an anarchic world characterized by great power conflict, one could make the argument that the executive branch requires maximum flexibility to defeat the enemy, who may not adhere to international law. Indeed, the precedents relied on most heavily by the Administration in the enemy combatant cases date from the 1930s and 1940s—a period when the international system was radically unstable, and the United States was one of several great powers vying for advantage.<sup>430</sup> But during that time, the executive branch faced much more exogenous pressure from other great powers to comply with international law in the treatment of captured enemies. If the United States strayed too far from established norms, it would risk retaliation upon its own soldiers or other consequences from

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423. *Id.* at 294.

424. *Id.* at 292.

425. BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* 8 (2008); MARGULIES, *supra* note 304 at 224–26.

426. MARGULIES, *supra* note 304, at 43 (“Throughout the war on terror, the Administration has appropriated power from particular sources while rejecting the corresponding limits.”).

427. *See id.* at 43.

428. *See supra* note 402 and accompanying text.

429. *See supra* note 129 and accompanying text.

430. *See supra* notes 202–10 and accompanying text.



powerful rivals. Today, there are no such constraints: enemies such as al Qaeda are not great powers and are not likely to obey international law anyway. Instead, the danger is that American rule-breaking will set a pattern of rule-breaking for the world, leading to instability.<sup>431</sup> America's military predominance enables it to set the rules of the game. When the U.S. breaks its own rules, it loses legitimacy.

The Supreme Court's response to the detainee policy enabled the U.S. government as a whole to hew more closely to established procedures and norms, and to regularize the process for departing from them. After *Hamdi*,<sup>432</sup> the Department of Defense established a process, the CSRTs, for making an individual determination about the enemy combatant status of all detainees at Guantánamo. After the Court recognized habeas jurisdiction at Guantánamo, Congress passed the DTA,<sup>433</sup> establishing direct judicial review of CSRT determinations in lieu of habeas. Similarly, after the Court declared the military commissions unlawful in *Hamdan*,<sup>434</sup> this forced the Administration to seek congressional approval for commissions that restored some of the rights afforded at courts martial.<sup>435</sup> In *Boumediene*, the Court rejected the executive branch's foreign policy arguments, and bucked Congress as well, to restore the norm of habeas review.<sup>436</sup>

Throughout this enemy combatant litigation, it has been the courts' relative insulation from politics that has enabled them to take the long view. In contrast, the President's (and Congress's) responsiveness to political concerns in the wake of 9/11 has encouraged them to depart from established norms for the nation's perceived short-term advantage, even at the expense of the nation's long-term interests.<sup>437</sup> As Derek Jinks and Neal Katyal have observed, "[t]reaties are part of [a] system of time-tested standards, and this feature makes the wisdom of their judicial interpretation manifest."<sup>438</sup>

At the same time, the enemy combatant cases make allowances for the executive branch's superior speed. The care that the Court took to limit the issues it decided in each case gave the executive branch plenty of time to

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431. See Jinks & Katyal, *supra* note 257, at 1245 (noting that other nations have justified the abuse of prisoners because of U.S. practices).

432. See *supra* note 105 and accompanying text.

433. See *supra* note 133 and accompanying text.

434. See *supra* notes 122–23 and accompanying text.

435. See Posting of Jack M. Balkin to *Balkinization*, <http://balkin.blogspot.com/2006/06/hamdan-as-democracy-forcing-decision.html> (June 29, 2006, 13:07 EST).

436. See *supra* notes 134–35 and accompanying text.

437. Jinks & Katyal, *supra* note 257, at 1264.

438. *Id.*



arrive at an effective detainee policy.<sup>439</sup> *Hamdi*, *Rasul*, and *Boumediene* recognized that the availability of habeas would depend on the distance from the battlefield and the length of detention.<sup>440</sup>

The enemy combatant litigation also underscores the extent to which the classic realist assumptions about courts' legitimacy in foreign affairs have been turned on their head. In an anarchic world, legitimacy derives largely from brute force. The courts have no armies at their disposal and look weak when they issue decisions that cannot be enforced.<sup>441</sup> But in a hegemonic system, where governance depends on voluntary acquiescence, the courts have a greater role to play. Rather than hobbling the exercise of foreign policy, the courts are a key form of "soft power."<sup>442</sup> As Justice Kennedy's majority opinion observed in *Boumediene*, courts can bestow external legitimacy on the acts of the political branches.<sup>443</sup> Acts having a basis in law are almost universally regarded as more legitimate than merely political acts. Most foreign policy experts believe that the Bush Administration's detention scheme "hurt America's image and standing in the world."<sup>444</sup> The restoration of habeas corpus in *Boumediene* may help begin to counteract this loss of prestige.

Finally, the enemy combatant cases are striking in that they embrace a role for representation-reinforcement in the international realm.<sup>445</sup> Although defenders of special deference acknowledge that courts' strengths lie in protecting the rights of minorities, it has been very difficult for courts to protect these rights in the face of exigencies asserted by the executive branch in foreign affairs matters. This is especially difficult when the minorities are alleged enemy aliens being held outside the sovereign territory of the United States in wartime. In the infamous *Korematsu* decision, another World War II-era case, the Court bowed to the President's factual assessment of the emergency justifying detention of U.S. citizens of Japanese ancestry living in the United States.<sup>446</sup> In *Boumediene*, the Court

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439. See Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1015 (2008) (arguing that the enemy combatant decisions were "mostly about process").

440. See *supra* notes 105–106, 111–113, 128–129, and accompanying text.

441. See Nzelibe, *supra* note 1, at 952.

442. Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1391 (2007).

443. See *supra* note 148 and accompanying text.

444. See *Guantánamo's Shadow*, ATLANTIC MONTHLY, Oct. 2007, at 40, available at <http://www.theatlantic.com/doc/200710/guantanamo-poll> (polling a bipartisan group of leading policy experts and finding 87% believed the U.S. detention system had hurt the fight against al Qaeda).

445. Katyal, *supra* note 442, at 1391.

446. *Korematsu v. United States*, 323 U.S. 214, 217–18 (1944); see also Gott, *supra* note 213, at 223.



pointedly declined to defer to the executive branch's factual assessments of military necessity.<sup>447</sup> The court may have recognized that a more aggressive role in protecting the rights of non-citizens was required by American hegemony. In fact, the arguments for deference with respect to the rights of non-citizens are even weaker because aliens lack a political constituency in the United States.<sup>448</sup> This outward-looking form of representation-reinforcement serves important functions. It strengthens the legitimacy of U.S. hegemony by establishing equality as a benchmark and reinforces the sense that our constitutional values reflect universal human rights.<sup>449</sup>

### CONCLUSION

When it comes to the constitutional regime of foreign affairs, geopolitics has always mattered. Understandings about America's role in the world have shaped foreign affairs doctrines. But the classic realist assumptions that support special deference do not reflect the world as it is today. A better, *more realist*, approach looks to the ways that the courts can reinforce and legitimize America's leadership role. The Supreme Court's rejection of the government's claimed exigencies in the enemy combatant cases strongly indicates that the Judiciary is becoming reconciled to the current world order and is asserting its prerogatives in response to the fewer constraints imposed on the executive branch. In other words, the courts are moving toward the hegemonic model. In the great dismal swamp that is the judicial treatment of foreign affairs, this transformation offers hope for clarity: the positive reality of the international system, despite terrorism and other serious challenges, permits the courts to reduce the "deference gap" between foreign and domestic cases.

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447. *Boumediene v. Bush*, 128 S. Ct. 2229, 2261 (2008).

448. Katyal, *supra* note 442, at 1387.

449. *Id.* at 1391 ("America's soft power depends, in no small part, on being able to rise above pettiness and to highlight the vitality of our system.").